

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES
SAN FRANCISCO BRANCH OFFICE**

NEWPORT MEAT SOUTHERN
CALIFORNIA, INC.

and

GENERAL TRUCK DRIVERS, OFFICE,
FOOD & WAREHOUSE UNION,
LOCAL 952, INTERNATIONAL
BROTHERHOOD OF TEAMSTERS

Cases 21-CA-209861
21-CA-214652
21-CA-217903

Ami Silverman, Esq., and
Edith P. Castañeda, Esq., for the General Counsel.

Daniel A. Adlong, Esq., and
Christopher J. Meister, Esq., for the Respondent.

DECISION

STATEMENT OF THE CASE

AMITA BAMAN TRACY, Administrative Law Judge. I heard this case on May 14 to 16, 21–22, and 28–30, 2019 in Los Angeles, California. This matter is before me on an amended consolidated complaint and notice of hearing (complaint) issued on December 12, 2018, arising from unfair labor practice charges filed by the General Truck Drivers, Office, Food & Warehouse Union, Local 952, International Brotherhood of Teamsters (the Union or Teamsters Local 952) against Newport Meat Southern California, Inc. (Respondent or Newport Meat).¹ Respondent filed a timely answer to the consolidated complaint.

The General Counsel alleges that in October and November 2017 Newport Meat in its efforts and responses to prevent unionization in the workplace committed numerous violations

¹ The Union filed the following unfair labor practice charges and amendments which were consolidated: 21–CA–209861 on November 14, 2017, and amended on December 19, 2017, January 10 and 31, 2018; 21–CA–214652 on February 12, 2018, and amended on February 22 and April 23, 2018; and 21–CA–217903 on April 5, 2018, and amended on April 24 and May 1, 2018.

of the National Labor Relations Act (the Act).² These allegations include violations of Section 8(a)(1) of the Act due to solicitation of employee complaints and grievances, unlawful threats and statements, distribution of an anti-union petition, and promises of increased benefits to employees during the “critical period”³ to encourage them to vote against union representation.

5 These allegations also include violations of Section 8(a)(3) and (1) of the Act due to withholding employee performance reviews and raises, removal of a supervisor, and withholding a reduction in healthcare costs to discourage employees from voting for the union in the representation election. Each specific allegation is addressed within this decision.

10 On the entire record,⁴ including my observation of the witnesses’ demeanor,⁵ and after considering the posttrial briefs filed by the General Counsel and Newport Meat,⁶ I make the following

FINDINGS OF FACT

I. JURISDICTION

15 At all material times, Newport Meat has been a Delaware corporation, with a facility located at 16691 Hale Avenue, Irvine, California 92606 (the Irvine facility), where it processes and markets meat products to restaurants and hotels. Newport Meat, during the 12-month period ending October 19, 2017,⁷ sold and shipped from its Irvine facility goods valued in excess of \$50,000 directly from points outside the State of California. Newport Meat admits, and I find, that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act, and the Union is been a labor organization within the meaning of Section 2(5) of the Act.

Based on the foregoing, I find that this dispute affects commerce and that the Board has jurisdiction of this case, pursuant to Section 10(a) of the Act.

² I granted the General Counsel’s motion to withdraw complaint pars. 16(a) and (b), 8(h), and 13 during the hearing. In its post hearing brief, the General Counsel motions to withdraw complaint pars. 6(f) and (g), 8(c), 9(c), 10(e), and 12(h) and (j). I grant the General Counsel’s motion.

³ The critical period is the time between the filing of the representation petition through the election. *Ideal Electric Mfg. Co.*, 134 NLRB 1275 (1961). Here, the representation petition was filed on October 10, 2017, and the election was to be held on November 9, 2017.

⁴ The transcripts and exhibits in this case are generally accurate other than misspellings and a few instances of identifying the incorrect individual speaking.

⁵ Although I have included several citations to the evidentiary record in this decision to highlight testimony or exhibits, I emphasize that my findings and conclusions are not based solely on those citations, but rather are based on my review of the entire record for this case.

⁶ Other abbreviations used in this decision are as follows: “GC Exh.” for the General Counsel’s exhibit; “R. Exh.” for Respondent’s exhibit; “Jt. Exh.” for Joint Exhibit; “GC Br.” for the General Counsel’s Brief; and “R. Br.” for Respondent’s Brief.

⁷ All dates are in 2017 unless otherwise specified.

II. THE ALLEGED UNFAIR LABOR PRACTICES

A. Newport Meat’s Organization

Newport Meat provides meat products to approximately 1600 restaurants and hotels throughout the western United States. Newport Meat employs approximately 80 employees who work in the warehouse and in production. Production is divided into departments (also known as portions) A and B. In department A, employees cut boned meat with an electric saw. In department B, employees cut boneless meat with a knife (Tr. 248, 463). Newport Meat also employs drivers in its transportation department who are not the subject of this complaint; these drivers have been represented by a labor organization since 1999.

Newport Meat is led by Denise Van Voorhis (Van Voorhis), who has worked for Respondent for 43 years and has been president for the past two years with responsibility for the day-to-day operations. Mike Drury (Drury) has worked for Newport Meat for 18 years, and currently holds the position of area president, western region. Drury oversees seven companies in the western United States, including Newport Meat. Roberto Diaz (Diaz) began working at Newport Meat on October 2 as the senior human resources manager, and his job duties are to be a “liaison between [Newport Meat] and the employees” (Tr. 889).⁸

B. The Union’s Organizing Campaign

On October 10, the Union filed a representation petition with Region 21 of the National Labor Relations Board (the Board) (Jt. Exh. 1(b)). To support its representation petition, the Union obtained and submitted signed authorization cards from the employees; during the hearing, several employees referred to the authorization cards as the “blue cards” they signed. The Union sought to represent a unit of employees (petitioned-for-unit or proposed unit) defined as:

All full-time and regular part-time cutter, trimmer, meat packer, receiver, debagger, order selector, portion/packer, meat inspector, checker, stock clerk, shipping (shipper), warehouse, forklift driver, janitor, mechanic, maintenance, meat inspector, dispatchers and working foreperson
EXCLUDING other employees, managers, supervisors and guards as defined by the Act.

The election was scheduled via stipulated election agreement for November 9, but due to the Union filing an unfair labor practice charge, the Region 21 Regional Director postponed the election indefinitely on November 8 (Jt. Exh. 1(c)).

C. Management’s Response to the Union’s Representation Petition

Upon learning of the Union’s representation petition, Van Voorhis, Drury, and Diaz held numerous mandatory meetings, or captive audience meetings, with small and large groups of

⁸ Respondent admits, and I find that Van Voorhis, Drury, and Diaz were supervisors and agents as defined by Sec. 2(11) and 2(13) of the Act.

employees in the petitioned-for-unit to discuss unionization and “to make sure that they had all the facts before they made a pretty serious decision” (Tr. 1103). In addition, Newport Meat hired two labor consultants, Angel Cornejo (Cornejo) and Simon Jara (Jara) to talk to employees about labor law (Tr. 792). Newport Meat also brought in Sysco Corporation’s (Sysco)⁹ Director of Labor Relations John Mitchell (Mitchell) to talk with employees about negotiations between unions and Sysco-owned companies. Cornejo, Jara, and Mitchell also held numerous captive audience meetings with employees during the critical period.¹⁰ Thereafter, Newport Meat held additional captive audience meetings with the employees to discuss the cancelled election as well as insurance rates for the 2018 calendar year.

Generally, supervisors notified employees to attend the meetings while the employees were on duty time. Diaz, Cornejo, and Jara spoke to the employees in Spanish which is the language many employees speak. In meetings led by Van Voorhis, Drury, and Mitchell, Diaz usually translated from English to Spanish for the employees and rarely Cornejo acted as the translator. Diaz also translated many of the written documents and scripts from English into Spanish and read those translations during the meetings.¹¹ During some of these meetings, the speakers used a written script while in other meetings no script was used.¹²

Before I continue with the Findings of Fact, I will set forth my general credibility assessment of the witnesses. Thereafter, I also include specific credibility analysis in other sections of the Findings of Fact.

General Credibility Assessments

Credibility determinations may rely on various factors, including “the context of the witness’ testimony, the witness’ demeanor, the weight of the respective evidence, established or admitted facts, inherent probabilities and reasonable inferences that may be drawn from the record as a whole.” *Hills & Dales General Hospital*, 360 NLRB 611, 617 (2014), citing *Double D Construction Group*, 339 NLRB 303, 305 (2003); *Daikichi Sushi*, 335 NLRB 622, 623 (2001). Moreover, a credibility assessment also includes an examination of “the expression of [the employee’s] countenance, how he sits or stands, whether he is inordinately nervous, his coloration during examination, the modulation or pace of his speech, and other non-verbal communication.” *Shen Automotive Dealership Group*, 321 NLRB 586, 589 (1996) (citing *Penasquitos Village v. NLRB*, 565 F.2d 1074, 1078–1079 (9th Cir. 1977)), cited with approval by the Board in *Daikichi Sushi*, supra. Additionally, it is well established that the trier of fact may believe some, but not all, of a witness’ testimony. *NLRB v. Universal Camera Corp.*, 179 F.2d 749, 754 (2d Cir. 1950).

⁹ The record is unclear regarding the relationship between Newport Meat and Sysco, and the parties chose not to explain the exact relationship.

¹⁰ Respondent admits, and I find that Cornejo, Jara, and Mitchell have been agents as defined by Sec. 2(13) of the Act.

¹¹ Despite Diaz’ claim of accurate translations, the translated documents contain errors such as the wrong date and missing sentences (See Jt. Exh. 1(e) compared to GC Exh. 13).

¹² According to Drury, the labor consultants drafted the scripts (Tr. 1128), but according to Van Voorhis, their attorneys drafted the scripts (Tr. 1047).

This case primarily concerns many captive audience meetings held with employees where Newport Meat and Sysco high-level officials along with labor consultants allegedly solicited grievances and made numerous threats, promises, and other coercive statements in violation of the Act. The numerous meetings held by Newport Meat as well as the lack of clarity as to when and where the meetings were held and who attended the meetings posed a challenge in determining the Findings of Fact.¹³ It is evident from the record that it is difficult to reconcile differences between the testimonies of the General Counsel’s witnesses and Newport Meat’s witnesses. The record makes clear that while Newport Meat’s witnesses testified generally about groups of meetings they led; the General Counsel’s witnesses testified about specific statements made in meetings not mentioned by Respondent’s witnesses. Newport Meat’s witnesses simply denied making these alleged unlawful statements in response to leading questions based on the employees’ testimonies. These denials are unreliable and limited in probative value as the responses were elicited through leading questions. See, e.g., *Weis Markets, Inc.*, 325 NLRB 871, 888–889 (1998), citing *Laser Tool, Inc.*, 320 NLRB 105, 109 (1995) (“The essentially bare denial that events occur or that any specific statements were made is not a persuasive or helpful aid to an evaluation of credibility”). Aside from a few meetings where Newport Meat witnesses used a script only, there is no other evidence of what did or did not occur during those other meetings except for witness testimony. The significant passage of time between the alleged statements (October and November 2017) to the hearing (May 2019) created a great deal of trouble for many of the witnesses from both parties to recall specific details of the meetings.

Hence, in determining whose testimony to accept and whose testimony to reject I rely upon several factors. First, all the employees who testified for the General Counsel are employees with multiple years with Newport Meat. They all testified against their pecuniary interest and most of the witnesses directly contradicted the testimony of the Newport Meat officials. See *Pacific Coast Sightseeing Tours & Charters, Inc.*, 365 NLRB No. 131, slip op. at 2 (2017) (current employees particularly credible since they are testifying against their employer’s interest and their own pecuniary interest); *Rose Printing Co.*, 289 NLRB 252, 270 (1988) (employee credible where she had no monetary or job interest in the outcome of the proceeding). Second, many of these employees testified with significant details from the meetings albeit with some errors such as when a meeting occurred or all the attendees from the meeting on behalf of Newport Meat. These minor errors are reasonable considering the number of meetings held during a short period of time. The employees I credit all testified to the best of their recollection. Many of the employees’ testimonies corroborated one another as far as what they heard during the meetings they attended even though it is unclear from the record which meetings they attended together. Respondent’s primary attack on the witnesses’ testimony is that they could not recall verbatim what Newport Meat’s witnesses stated during these various meetings. However, it is unlikely any witness could recall verbatim what was said in entirety. Rather it is more likely for witnesses to recall phrases or words used in meetings. Consistently, many of these witnesses heard similar phrases or words made in the meetings they attended. In fact, while Newport Meat’s witnesses relied upon their scripts to confirm what they told the employees, the General Counsel’s witnesses did not have the benefit of these scripts, and simply recalled to the best of their recollection as to what occurred. Their consistent recollections of

¹³ Van Voorhis testified that Newport Meat had a sign-in sheet for employees who attended each meeting (Tr. 1046). However, neither party moved into evidence these sign-in sheets.

scripted meetings are persuasive as it bolsters their account of unscripted meetings. Hence, I give more weight to multiple employees testifying about similar statements they heard during the meetings they attended. Third, testimonial demeanor is relevant. Many of the employees testified with conviction and did not waiver on cross-examination. Finally, Newport Meat's witnesses contradicted one another as well as the documentary evidence, and could not recall details during cross-examination. Their lack of candor during various parts of their testimony greatly undermines my belief in the truthfulness of their testimony. In sum, I rely primarily on those employees who recalled the greatest details which were corroborated by other witnesses as well as the documentary evidence. I only credit the testimony of Newport Meat witnesses in part.

Overall, the General Counsel's witnesses testified honestly and thoughtfully. It did not appear that any of the witnesses testified untruthfully or hyperbolically. I credit the testimonies of the following witnesses:

(1) Department A Meat Cutter Evardo Jimenes' (Jimenes): I credit the majority of Jimenes' testimony because he remained consistent throughout his testimony. This consistency includes the order of the meetings he attended, who spoke on behalf of Newport Meat and what they said, and how long the meetings lasted. Jimenes' also testified passionately and insisted on the phrases he heard Newport Meat's supervisors and agents utter. Jimenes admitted that he did not recall exactly what was said during these meetings, but stated that "what hurts you, stays imprinted [...] on your mind" (Tr. 63). Such a statement rings with truth as the passage of time and number of meetings would not lend itself to an employee recalling word-for-word what was said. In addition, Jimenes' testimony was corroborated by other witnesses who heard similar statements made during the meetings they attended.

(2) Department B Trimmer and Packager Edith Gutierrez del Tirado (Gutierrez del Tirado): I credit most of Gutierrez del Tirado's testimony. Gutierrez del Tirado testified in a straightforward, unhesitating, and calm manner while providing details from the meetings she attended despite some inconsistencies with the timing of events.

(3) Department A Pack-Off¹⁴ Osvaldo Valdivia's (Valdivia): I credit Valdivia's testimony because his demeanor remained confident even under a quick-paced cross-examination. He earnestly listened to the questions being asked of him, paused to think before responding to the questions, and candidly admitted his nervousness when testifying. Valdivia also spoke passionately and emotionally. His overall testimony remained consistent with his Board affidavits and was corroborated by other witnesses including Jimenes and Gutierrez del Tirado as well as the scripts from these meetings.

(4) Department B Meat Cutter Jose Martin Lopez Contreras (Contreras): I partially credit the testimony of Contreras. As with many of the witnesses, Contreras timing of events and placement of events in relation to the November 9 election date is not

¹⁴ A pack-off sends meat products to the warehouse for delivery (Tr. 247–248).

accurate. Contreras testified he attended 20 to 30 meetings, the most of all General Counsel’s witnesses, with these meetings beginning in November, according to his testimony. It is unlikely Contreras attended the number of meetings he claims beginning only approximately 9 days before the election. However, his recollection of statements made during the meetings is corroborated by other employees. Thus, I rely upon only those meetings where he provided specific details which are corroborated.

(5) Department A Trimmer Diego Mendoza Medrano (D. Mendoza): I credit D. Mendoza’s testimony as he spoke honestly as to what he recalled and remained consistent throughout his testimony. D. Mendoza did not appear to exaggerate or frame his testimony to favor the General Counsel.

(6) Department A Meat Cutter Moises Arreguin (Arreguin): I credit most of Arreguin’s testimony as he testified honestly and consistently with the other employee witnesses. As with the other witnesses, his testimony was not completely clear as to what occurred during each meeting. However, I will credit his testimony when corroborated by other employees.

There were two General Counsel’s witnesses who had poor memories as demonstrated by their lack of recall and confusing testimony. Thus, I did not rely upon witnesses Pedro Luna (Luna) and Raul Mendoza (R. Mendoza). Luna could not recall many details from the meetings and testified inconsistently from his Board affidavit. Luna’s testimony was simply not reliable, and I decline to rely upon any portion of his testimony. I also decline to rely upon the testimony of R. Mendoza. R. Mendoza provided confusing, contradictory testimony, and could not recall basic facts such as his supervisor’s last name. In addition, his answers were often not responsive to the questions asked. R. Mendoza also often provided the same response to every question asked as to what Newport Meat told the employees about the Union. Thus, I do not rely on R. Mendoza’s testimony.

As for Newport Meat’s witnesses, I only partially credit the testimony of Drury, Van Voorhis, Diaz, Cornejo, Jara, Mitchell, and Jonathan Martinez (Martinez). Their testimonies contradicted one another, and on cross-examination the witnesses were not forthright in their recollection of events while on direct examination they could recall significant details. As result, I cannot rely on their testimony as to what they said during the unscripted meetings. However, I credit their testimony for the scripted meetings where many of the statements they made are confirmed by the script. Overall, these supervisors and agents’ denials of unlawful acts are unconvincing.

I did not find Drury to be entirely credible. Drury testified in a matter-of-fact manner and did not waiver on cross-examination. However, at times Drury testified inconsistently with the evidence. For example, Drury testified that Newport Meat retained labor consultants because they did not have experience with representation petitions. However, Van Voorhis’ initial speech to the employees, subsequent to Drury’s speech to the employees, directly contradicted his claim. Van Voorhis’ told the employees that Sysco had a “long history with dealing with unions” which is why they could definitively state that the employees are better without a union. Sysco’s director of labor relations assisted Newport Meat in their response to

the representation election. Thus Van Voorhis' statement of experience certainly undermines Drury's claim of ignorance and novelty. As another example, regarding his knowledge of Martinez' opinion on the Union, Drury feigned ignorance, but his written script at the November 3 lunch meeting undermines this claim. Drury clearly informed all employees of Newport Meat's knowledge as to the opinions of various employee groups about the Union. Drury claimed to be a simple facilitator when Martinez approached him to have a meeting with all employees but again Drury's speech made clear that he supported Martinez' desire to meet with employees to convince them to vote against the Union. Drury also gave the impression that he did not know how the employees intended to vote but then on cross-examination admitted that he took the position that most employee would vote against the Union which he claimed to be based on his "impression" and "feeling" gained during the employee meetings he held and attended (Tr. 1147). Thus, I cannot credit Drury's testimony other than the testimony which is corroborated by a written script.

I cannot credit much of Van Voorhis' testimony. Van Voorhis appeared nervous during her direct examination testimony, but then appeared evasive on cross-examination. Her memory was unsure. Particularly, when the subject of Martinez arose, Van Voorhis took a different position than Drury regarding her knowledge of Martinez' opinion on the Union. Van Voorhis painted Martinez as a pro-union supporter while Drury dubiously claimed that Martinez was neutral. Van Voorhis also greatly undermined any reliance on her testimony when she claimed to not know the existence of sample union letters while her script, which read verbatim, mentions a union letter specifically. Like Drury, Van Voorhis testified inconsistently from the record. Van Voorhis testified that she had no experience with union organizing campaigns despite her statements to the contrary to employees (Tr. 1015). Van Voorhis, again, claimed to hire the labor consultants as their involvement was in the "best interest" of the employees to have the labor consultants share information so they could make an educated decision. Van Voorhis' entire testimony obfuscated the truth, and she was not credible.

Mitchell testified credibly regarding his PowerPoint slideshow presentation. However, on cross-examination, Mitchell's demeanor and tone of his voice became defensive and testy while his memory became void of details or recollection. Mitchell offered only straight denials of accusations against him made by employees who attended his meetings. Moreover, Mitchell claimed that he did not read from the slides or his closing script verbatim. In contrast, Drury, who claimed to have attended each of the meetings Mitchell conducted, testified that Mitchell spoke verbatim from the slideshow and script, and did not say anything more. Mitchell claimed that the employees did not ask any questions during his presentation of 90 minutes even though he did not forbid questions being asked. I cannot credit Mitchell's testimony.

Diaz testified generally credibly about undisputed facts but did not add much to the record. Diaz claimed to have accurately translated Drury, Van Voorhis, and Mitchell's speeches from their scripts verbatim, but Diaz made a few errors in the translation. Furthermore, like Respondent's other witnesses, Diaz simply denied all the allegations against Newport Meat without offering any clarifications or reasons for another interpretation. Diaz also could not recall some key details of the meetings and provided vague testimony. On cross-examination, Diaz could not recall many significant facts such as whether documents were provided to employees and what was the subject of a video shown by Drury. Thus, Diaz' memory was poor and unreliable.

Like the other Newport Meat witnesses, Cornejo testified with details during his direct testimony but on cross-examination his testimony was vague and conclusory. For example, he could not recall if employees spoke despite the slideshow presentation ending with a request for questions. In addition, some portions of his testimony were generic as to what information he provides to employees when he is hired by a company as a labor consultant rather than what he told Newport Meat's employees at the meetings (Tr. 855). Thus, I cannot rely on Cornejo's testimony.

Jara provided vague testimony and could not recall many of the details from these meetings he led with Cornejo. In addition, Cornejo and Jara testified inconsistently with one another regarding some details of the meetings. Hence, I cannot credit the entirety of Jara's testimony.

Martinez testified credibly on direct examination regarding the meetings that took place at Newport Meat. However, on cross-examination, when questioned about his involvement in asking employees to obtain their authorization cards from the Union, he became vague and contradictory. He is not a believable witness on this critical matter.

Newport Meat subpoenaed several employees to testify during their case-in-chief. These employees, like the General Counsel's witnesses, are current, long-term employees. I credit the testimony of the following employee witnesses:

(1) Warehouse Employee Leonardo Garcia (Garcia): Garcia testified somewhat credibly. He provided limited testimony as to the meetings he attended, and some of the details he provided did not generally reflect the sequence of events.

(2) Department B Machine Operator Angel Camacho (Camacho): Camacho testified credibly. Camacho provided his general impressions from the meeting he attended with Mitchell. However, Camacho could not recall specific details from the meeting such as questions asked by the employees and Mitchell's response.

(3) Warehouse Employee Gabriel Cueva (Cueva): Cueva testified only generally about the few meetings he attended. Like Camacho's testimony, Cueva was credible but, his testimony was of limited value.

(4) Warehouse Employee Matthew Durkee (Durkee). Durkee testified generally credibly. I rely upon his testimony for most of the meetings he attended as his testimony was corroborated by other witnesses.

Meetings Held the Week of October 9 to Announce the Union Election Petition

Newport Meat's first set of meetings with employees occurred on or after October 11, 1 day after the Union filed the representation petition. Van Voorhis and Drury held approximately 3 to 6 small group meetings throughout that week with the approximately 100 employees and their supervisors in the proposed unit. Van Voorhis and Drury testified that they read verbatim from a script in English, and Diaz read from a Spanish script which he translated from the

English script (GC Exh. 9, 17). Van Voorhis and Diaz testified that these meetings occurred in the kitchen for approximately 30 minutes each (Tr. 891, 1045).

Drury, Van Voorhis, and Diaz testified that the meetings they held did not vary because they were following a script. The script clearly set forth Newport Meat’s position that the employees would be making a “mistake” which “can end up haunting” them for the remainder of their work years, it would not be in their “best interest” to elect the Union to represent them, and that Newport Meat and Sysco preferred operating union-free as it is in the best interests of itself, its employees, and its customers. Van Voorhis stated that they “have come to this conclusion because of our long history of dealing with unions and union operations.” Van Voorhis further stated that there was no reason why the employees should pay dues to the Union or risk a potential strike for working at Newport Meat. Finally, Van Voorhis stated that the employees would be given a second chance to correct their mistake during the representation election. Drury and Van Voorhis concluded these series of meetings by letting the employees know they could not answer any questions due to time constraints but would answer their questions in the coming weeks. I credit Drury, Van Voorhis, and Diaz’ testimony as to what they stated during this set of scripted meetings. Although I disbelieve Drury and Van Voorhis’ claims that they did not have any experience in labor law, the overwhelming evidence shows that they did follow the scripts for these meetings. The General Counsel’s witnesses confirm as such.

For example, Valdivia testified that he attended one of these initial meetings at 8 a.m. with approximately 40 employees from departments A and B as well as the warehouse (Tr. 249–250). Valdivia confirmed that Van Voorhis told the employees about the representation petition, that a union was not good for Newport Meat or its customers, and that she would not answer any questions (Tr. 252). Valdivia testified that during the meeting he attended, Van Voorhis only spoke. Although it is likely that Drury also attended and spoke at this meeting, Valdivia recalled accurately the statements made at this meeting which are mirrored by the script. D. Mendoza testified that he also attended one of these meetings but did not recall Drury’s presence. D. Mendoza’s testimony is also consistent with the script read by Van Voorhis (Tr. 307). Jimenes testified that he attended one of these initial meetings in a conference room with employees from both departments. Jimenes testified that Drury told the employees it would be a mistake to elect the Union, and that Van Voorhis told the employees that while a union represented the transportation employees, Respondent preferred to operate without a union as operating union free was best for Newport Meat and its customers. Jimenes further testified that Van Voorhis provided statistics as to the percentages of unionized employees at Sysco, and that when there was no union, there were no union dues, and no chance of a strike (Tr. 84). Jimenes added that the employees were told that those who signed the authorization cards had made a mistake but that the employees would have a second chance during the election (Tr. 85).¹⁵ Gutierrez del Tirado testified that she also attended one of the

¹⁵ The General Counsel asserts that Jimenes testified that Drury and Van Voorhis commented at an initial meeting that they wanted to help the employees as they were not aware of the problems at Newport Meat (GC Br. at 9–10). I cannot credit Jimenes’ testimony on this point. No other employee testified that Drury and Van Voorhis made this type of comment at the initial meetings. Each employee instead reiterated certain portions of Drury and Van Voorhis’ comments, corroborated by the script, which stood out in their minds. Furthermore, they consistently testified that despite comments by employees at the meetings, they did not answer these questions.

meetings in the kitchen with Drury, Van Voorhies and Diaz. Her testimony is similar to her coworkers as to what Van Voorhis and Drury stated at the meeting. These employees' testimonies are remarkably accurate as to what Drury and Van Voorhis told the employees as supported by the script.¹⁶

5

Week of October 16 and 30 Meetings Led by Cornejo and Jara

The weeks of October 16 and 30 labor consultants Cornejo and Jara met with the employees in small group meetings.¹⁷ Cornejo and Jara held two sets of meetings—the first, the week of October 16, to discuss the Act, and the second, the week of October 30, to discuss collective bargaining. In total, Cornejo and Jara held approximately 15 small group meetings with 8 to 15 employees each in the lunchroom or conference room (Tr. 793, 795). No management official from Newport Meat attended these meetings. During these meetings, Cornejo primarily spoke while Jara spoke occasionally and only answered questions directed towards him (Tr. 860).¹⁸ During these meetings, employees asked questions and raised issues about the workplace (Tr. 1129–1130). These meetings lasted 30 minutes to 1 hour depending on questions from employees.¹⁹

During the first set of 5 to 6 small group meetings, Cornejo and Jara, who spoke in English and Spanish, discussed the Act with a PowerPoint slideshow and provided English-only copies of a highlighted “Basic Guide to the National Labor Relations Act” (the basic guide) to employees (Tr. 841, 860; R. Exh. 1, 3).²⁰ These materials were their “script,” but they did not read verbatim from the slides (Tr. 796, 839). Cornejo testified that they would discuss highlighted material from the Act, which was reflected on a PowerPoint slide, while the employees followed along in the basic guide. During these meetings, Cornejo told the employees repeatedly that negotiations may last indefinitely and neither the Union nor Newport Meat must agree (Tr. 842). Cornejo claimed not to have said anything specific about the employees' wages and benefits while negotiations took place.

¹⁶ In contrast, Garcia, who testified on behalf of Newport Meat, testified inconsistently with all the above employees as well as Van Voorhis and Drury as to what occurred during these first sets of meetings. Garcia testified that Van Voorhis informed the employees about the representation petition and informed the employees that if the Union was elected, Newport Meat would negotiate, that those negotiations may not work in the employees' favor, and negotiations would involve a give and take (Tr. 1171–1172). Contrary to Diaz' testimony, Van Voorhis nor Drury discussed negotiations when they announced the filing of the representation petition.

¹⁷ Drury incredibly claimed that he did not know whether Cornejo and Jara met with groups of employees (Tr. 1130). Newport Meat hired these labor consultants, and Drury more likely than not would have known what these labor consultants did at the Irvine facility. In addition, these meetings occurred during duty time, and Newport Meat would have knowledge when even small groups of employees ceased working on Respondent's mission to attend meetings. In fact, Drury testified that he held small group meetings rather than one large meeting with employees when answering their questions because “we still had to get the work done” (Tr. 1131). This lack of truthfulness is one example of many which exemplifies why Drury's testimony cannot be credited in its entirety.

¹⁸ Jara could not recall what questioned were directed at him (Tr. 870). Jara had little recollection of specific statements made during these meetings except that Jara was certain that Cornejo did not threaten employees. Considering Jara's lack of recall as to what was said during these meetings, I cannot rely upon his testimony.

¹⁹ Despite the slideshow ending by asking employees if they had any questions, Cornejo denied soliciting questions (Tr. 848–849). Cornejo claimed that employees spoke up with statements but no questions (Tr. 849–850). Cornejo also claimed that he did not respond to any questions. However, multiple witnesses credibly testified that employees were permitted to ask questions and Cornejo or Jara responded. Such a denial by Cornejo greatly undermines his testimonial credibility.

²⁰ Cornejo testified that he did not highlight the guide but that an attorney highlighted the material.

In a second set of 5 to 6 meetings, Cornejo and Jara met with small groups of employees to discuss collective bargaining (R. Exh. 4). Cornejo and Jara used another PowerPoint slideshow which was in English. Cornejo spoke to the employees in English and Spanish. Cornejo testified that the topics on the slideshow arose from questions presented to them by employees (Tr. 816). Before discussing bargaining, the slideshow begins with an allegation that employees are being misled and that the union lies. The slideshow presentation also included examples of bargaining at other Sysco locations. Again, Cornejo reiterated that bargaining could take years.

On cross-examination, Cornejo testified that he did not tell employees what would happen to their wages and benefits if negotiations lasted years but then contrarily, also admitted that he told employees that the status quo for their wages and benefits would remain throughout the process (Tr. 845–847). The slideshow also references a handout provided to employees, but Cornejo claimed that no handouts were provided and instead “handout” referred to “some letters that went out to employees” (Tr. 844). During this presentation, Cornejo provided some information on picketing. Cornejo testified that he could not recall using the term “blank slate” during his second meeting, and never told employees at what point bargaining would begin (Tr. 852).

Several employees, including D. Mendoza, Jimenes, Arreguin, Valdivia, and Gutierrez del Tirado, credibly testified about statements or comments made by Cornejo and Jara at these meetings.²¹ D. Mendoza testified that Cornejo told the employees that during negotiations sometimes the union won, and employees lost, and that he did not have a “crystal ball” to know if their contract would be good or not (Tr. 314). Jimenes, who referred to Cornejo and Jara as “union breakers,” testified that Cornejo asked the employees why they wanted a union, and the employees responded that they wanted respect from Newport Meat along with better benefits. In response, Cornejo told the employees that the raises would “freeze” while the Union was there (Tr. 28). Jimenes and Arreguin testified that Cornejo told the employees that the Union was not good, not worth it for the employees, and only wanted to take their money (Tr. 28, 357). Arreguin recalled Cornejo asking the employees what their concerns in the workplace were, and Arreguin told Cornejo that if employees were not liked by their supervisor, they were treated badly, and their wage raises were not good (Tr. 360). Like Jimenes, Valdivia referred to Cornejo and Jara as “union busters” or “union bombers,” and testified that Jara told the employees that the Union was “no good” and why should you pay dues to the Union (Tr. 255, 271–272). Valdivia also testified that Jara told them that negotiations would “start at zero” and with a blank paper (Tr. 255, 288). Gutierrez del Tirado testified that Cornejo told the employees that he was there to share what a union was about so that they would not have union (Tr. 528). Gutierrez del Tirado testified that Cornejo told the employees that in negotiations everything such as benefits would be on the table and “they were going to start from zero” (Tr. 528–529, 570). She also testified that Cornejo told them they would start with a blank contract (Tr. 570).

Due to Cornejo’s lack of candor as to whether questions were asked and answered during these sets of meetings, I do not credit his version of events. I also cannot credit Jara as he could not recall most of the details from the meetings. It is clear from the witness’ testimony that the

²¹ Durkee also attended one of these meetings with Cornejo along with 5 to 6 employees. During that meeting, Cornejo only spoke English, and thus Durkee did not attend the same meeting as the Spanish-speaking employees and could not have been a witness to the allegations in this complaint regarding Cornejo.

employees attended several meetings and at various times had difficulty placing the timing of events with the meetings they attended. This confusion as to which meetings these statements were made by Cornejo and Jara is reasonable. The overwhelming tenor of the employee's testimony is that they recall these statements being made by Cornejo and Jara at multiple meetings. Thus, I rely upon the testimonies of D. Mendoza, Jimenes, Arreguin, Valdivia, and Gutierrez del Tirado.

Week of October 23 Meetings Led by Drury

The week of October 23, Drury met with small groups of employees in the conference room to provide answers to the employees' questions (Tr. 1105–1106). During these sets of 4 to 6 meetings, Drury used PowerPoint slides that were in English (R. Exh. 6). Drury testified that he read directly from the PowerPoint slides while Diaz translated into Spanish. Drury stated that he could not recall any specific questions asked by employees during these meetings and testified that he did not diverge from these slides as this subject was not his "profession" and he wanted to make sure that he stayed "within the boundaries or guidelines required" (Tr. 1107). Unlike the meetings where Drury relied on a script, I cannot credit Drury's testimony that he did not say anything other than the text on the PowerPoint slides. It is not plausible that he did not say anything more than what was written on the slides. Numerous employees' testimonies contradict his claim. Furthermore, Drury lacks credibility when he claims that he was a novice regarding labor laws. Drury told the employees at these meetings that Newport Meat had an opinion on unionization due Sysco's "long history of dealing with unions" (R. Exh. 6, p. 9). At the very least, Drury received assistance from Sysco as evidenced by Van Voorhis' speech during the initial testimony. Drury's continual claims of ignorance are not believable.

In addition, Drury's PowerPoint slides corroborate many of the employees' testimonies regarding what they heard from Newport Meat representatives throughout the critical period. For example, Drury informed employees that they are not guaranteed higher pay and better benefits and based on give and take negotiations could lose pay and benefits which other Sysco employees have seen after they voted for the union (R. Exh. 6, p. 4, 11). Drury informed employees that during negotiations, "[I]t can be illegal for a company to make unilateral changes in the employees' pay and benefits even if the company usually gave the employees an increase each year before the election" and employees may go "years" without a pay increase if the union cannot get the company to agree to an increase (R. Exh. 6, p. 6). Furthermore, Drury informed the employees that "the contract is a **blank** sheet of paper" and their present pay and benefits will not become part of the contract until Newport Meat agrees (R. Exh. 6, p. 12 (**emphasis in original**)). Drury cautioned the employees that the only way to ensure they would not lose pay or benefits "is to make sure that a union **never** had the right to bargain for you" (R. Exh. 6, p. 12 (**emphasis in original**)).

On the topic of health insurance, Drury repeatedly informed the employees that they were considering making changes which would "enhance the plan and your plan experience" but they could not discuss their thoughts because they could be seen as bribing the employees. Drury told the employees, though, that if they remained nonunion, then there would be "no legal prohibition against" Newport Meat "implementing changes to the medical plan which can benefit all participants" (R. Exh. 6, p. 13–14). Drury told the employees that "we have been listening to you very intently and noting the concerns and issues which you have brought-up. If

you decide to vote against union representation and stay nonunion, there will be no legal prohibition after the election against our making the kind of changes and improvements we have been discussing for the past few months” (R. Exh. 6, p. 20). Drury asked the employees to trust Newport Meat and that they were listening and wanted to work out their concerns (R. Exh. 6, p. 21).

Several employees who attended these meetings confirmed Drury’s statements to them along with additional comments which he denied making. As set forth above, I do not credit Drury’s statements with regard to these additional comments he made as the employees corroborated one another and Drury denied basic facts about his own slideshow presentation. For example, Valdivia testified that Drury showed the employees a video about the union which informed the employees that the union was not good for them and they would be better off without a union (Tr. 262). Thereafter, Drury told the employees that Newport Meat would negotiate in good faith but that they were “going to start at zero” (Tr. 262–263). Valdivia testified that Drury told the employees they could lose their retirement 401Ks and it could be frozen (Tr. 263). Gutierrez del Tirado also testified that she attended one of these meetings where Drury showed the employees a video. In response to an employee question regarding how Newport Meat would have the meat cut if the employees went on strike, Drury told them employees that they would use replacement workers (Tr. 577). Finally, Jimenes also credibly testified that Drury told the employees that if they voted against the Union, Newport Meat could lower their insurance and probably give them salary raises (Tr. 38, 90–92).

Week of October 30 Meetings Led by Mitchell

In late October, Mitchell also held a series of 3 to 4 meetings in a conference room with groups of approximately 20 employees to discuss collective bargaining as well as specific examples of unionization at Sysco. (Tr. 960, 1113.) During this time period, Mitchell’s job duties routinely involved negotiating collective-bargaining agreements for operating companies owned by Sysco Corporation. Mitchell testified that Newport Meat invited him to talk with employees about the “realities of bargaining” (Tr. 959). Mitchell informed the employees that he would be Newport Meat’s negotiator if the employees selected the Union as their representative.

For the first 20 minutes of the meeting, Mitchell showed the employees a 32-slide PowerPoint presentation (Tr. 96–97, 120; R. Exh. 2).²² The slideshow presentation was titled, “Newport Meat Winners and Losers” (R. Exh. 2). Mitchell provided the employees various examples of contract negotiations throughout Sysco (Tr. 97–103). Again, as in other meetings, Diaz translated from English to Spanish for Mitchell. During the PowerPoint presentation, Mitchell repeatedly told the employees that when they vote for a union, the union wins but the employees lose; the employees are losers. Mitchell testified that he did not read the slides verbatim but used the slides as a reference (Tr. 962–963, 967). Furthermore, Mitchell did not prepare these slides and did not ensure the accuracy of the contents of information presented on the slides (Tr. 1001).

²² In contrast, Drury testified that Mitchell spoke verbatim from the slides (Tr. 1140). Again, Drury’s testimony cannot be credited as it is directly contradicted by Mitchell as well as the employees who attended the meetings.

After his slideshow presentations was completed, Mitchell made closing remarks to the employees (GC Exh. 11). Although Mitchell had a script, he denied reading verbatim from it to employees (Tr. 983). Mitchell told the employees that they were better than employees at other locations because they were not unionized (Tr. 994). Mitchell testified that if he were to negotiate, he would evaluate the market to determine wages at Newport Meat. Mitchell further explained that as a comparator, the same employees at Palisades Ranch, a unionized company located near Newport Meat, performing similar functions as Newport Meat, and owned by Sysco, make less than those same employees at Newport Meat. As set forth in his script, Mitchell admitted that he told employees they do the same work as the employees at Palisades Ranch and why would Newport Meat pay them more than the employees at Pacific Palisades. Mitchell testified regarding collective bargaining:

You know, the other piece about the collective bargaining that's not in the presentation, but I say and did say, would be, look, and when we do that, when we do that sitting down, you know, there is no collective bargaining agreement, it's an initial agreement. And so there aren't any terms to the agreement, you know, the terms are here, there's none. Both parties put proposals on the table and as those—you know, as those proposals are agreed to, they begin to populate what was a blank contract, and it develops into a contract.

(Tr. 984). Mitchell testified that when he mentioned “blank contract” he held up a piece of blank paper to demonstrate a blank contract to employees (Tr. 986). Martinez testified that he recalled Mitchell using the term “blank contract” during the meeting he attended (Tr. 717). Drury testified similarly (Tr. 1113, 1141). Diaz testified that Mitchell held up a piece of blank paper which represented a blank agreement, but Diaz admitted that he did not translate the word “blank” literally into Spanish but instead used the phrase “a contract with nothing on it” (Tr. 941–942).

Mitchell testified that he thereafter discussed strikes:

And if you do [strike], the company can and will continue to service customers. The company—and will do that either by hiring temporary or in some cases permanent replacements to do the work. And the other option is to move work from one company to another company, so that that company, in this case Palisades, the company can move percentages of work from Newport to Palisades, have that work done over there, and it can be moved back to Newport and then continue to process. So to the extent that we can't hire enough associates to do the work, we can move the work elsewhere.

(Tr. 985). Mitchell also claimed that he discussed a transfer of work in relation to a strike (Tr. 996–997; GC Exh. 11). But the script states that Newport Meat “today” could shift 15 to 20 percent of their work to Palisades Ranch, and in a year, could shift 50 percent of the work, and after a year, it could “all be downhill” (GC Exh. 11). Mitchell claimed that this shift in work could occur due to a strike, but the script does not make this distinction. Although Mitchell claimed he did not read from the script verbatim, it is more likely than not that Mitchell

generally conveyed to employees how he could move the work from Newport Meat anytime, and not only in the event of a strike.

Employees who attended these meetings recall additional statements made by Mitchell.

5 Jimenes recalled significant details from Mitchell’s meeting which are corroborated by Mitchell’s PowerPoint slides and script. Jimenes testified that Mitchell stated that while the Union was there, “the salary raises would be frozen, and if we voted for the Union, they were going to start removing all the benefits” the employees had (Tr. 40). Jimenes also testified that Mitchell said if the employees voted in favor of the Union, he would start negotiations at “zero,”

10 start lowering their salaries, and take away benefits (Tr. 41, 110–111). Jimenes testified that Mitchell stated that they would begin with a blank contract (Tr. 112). Jimenes testified that Mitchell compared the highest salaries at Newport Meat to Palisades Ranch, whose employees make less than the employees at Newport Meat (Tr. 104–105.) In response, Jimenes told Mitchell that he did not make the alleged highest salary at Newport Meat according to the slide

15 Mitchell showed the employees (Tr. 41). Mitchell responded that he could lower Jimenes’ salary to \$14 per hour in the context of collective bargaining (Tr. 41, 109). Jimenes also testified that Mitchell told the employees that if there was a strike, he was going to send the work to other companies, and he had the right to close Newport Meat if he so chose (Tr. 41–42). Mitchell told the employees that they would be making a big decision the following week and should vote against the Union (Tr. 104–105). During the meeting Arreguin attended, he recalled Mitchell telling employees that “he was going to lower all their salaries to the minimum, and if the union came in, they could send meat to other companies if it was possible” and “he would close the company” (Tr. 373). Arreguin also testified that during negotiations with the Union, Mitchell told them that everything would be frozen such as their 401Ks and performance

25 reviews. Gutierrez del Tirado also testified that Mitchell said that negotiations would start at zero for everything including benefits, and wages and benefits would be frozen (Tr. 551, 573). I credit Jimenes’ testimony as he recalled many details from this meeting including the various points Mitchell covered, which is corroborated by Mitchell’s slideshow as well as his own testimony. I also credit Arreguin’s testimony despite his failure to recall the slideshow Mitchell presented. Finally, I credit Gutierrez del Tirado’s testimony as her testimony is corroborated by

30 Jimenes.

Even witnesses called by Newport Meat corroborated the testimony of the General Counsel’s witnesses. Garcia recalled that Mitchell told the employees that negotiations could

35 last indefinitely and that negotiations involved a give and take. Garcia also recalled Mitchell discussing strikes and that strikes would be harmful to their families while Newport Meat could hire employees to perform their job duties (Tr. 1176–1178). Camacho recalled Mitchell comparing Newport Meat to other companies who are unionized. Camacho recalled that Mitchell showed the employees that their benefits were better than the unionized companies.

40 Negotiations were described as a give and take. Camacho recalled Mitchell informing the employees regarding negotiations, “So it’s like—it’s like a give-or-take. Like, you’re not going to have all the benefits that you—you had, you know? It’s—it’s not going to—you’re not guaranteed to have all the benefits you have now” (Tr. 1082). Camacho testified that Mitchell told the employees that negotiations could take a long time and their wages and benefits would

45 remain the same during those negotiations. Finally, Martinez testified that he recalled Mitchell telling employees that they could lose or gain benefits or benefits would remain the same (Tr.

719). Martinez testified that Mitchell told the employees if there was a strike, Newport Meat would bring in other employees or send work elsewhere.

Throughout October, Diaz, Van Voorhis,
Drury, and Cornejo Met with Employees in Unscripted Meetings

In addition to the sets of small group meetings as described previously, throughout the month of October, Drury, Van Voorhis, and/or Diaz held several meetings with employees in small group sessions to discuss issues in the workplace. Based upon employee testimony as to the sequence of events, in early October, Diaz met with small groups of employees to discuss the Union and Newport Meat. Valdivia testified that he attended a short meeting led by Diaz in a conference room with nine other employees (Tr. 253). During this meeting, Diaz asked the employees to give Newport Meat a second chance and give them 6 months to “fix” everything (Tr. 253–254). Gutierrez del Tirado attended a meeting with Diaz and Cornejo in the conference room with 10 other employees (Tr. 534). Gutierrez del Tirado recalled Diaz telling the employees that he was new to Newport Meat but that the employees should give him 6 months to help them with wages and health insurance (Tr. 535). Diaz did not testify about these meetings. I credit the testimony of Valdivia and Gutierrez del Tirado as they corroborate one another, and Diaz did not refute their testimony.

Van Voorhis and Diaz also held at least one meeting with employees in October to discuss workplace issues. D. Mendoza testified that he attended a meeting in the kitchen held by Van Voorhis and Diaz with approximately 8 to 10 employees less than a week after the representation petition had been filed. During this meeting, Van Voorhis announced that “the salaries were going to be cancelled.” However, on cross-examination, D. Mendoza explained that Van Voorhis told the employees that there would be no raises during the election time period and informed the employees that no performance reviews would be held in response to a question by an employee (Tr. 311–312, 438). Although Van Voorhis did not testify about this specific meeting, she confirmed that she informed employees that no raises or performance reviews would be issued during the election period (Tr. 1069). Contreras testified similarly that, in a meeting he attended, Van Voorhis told them that everything was frozen including their performance reviews due to the Union (Tr. 476). Valdivia attended a meeting with Van Voorhis with Diaz as the translator into Spanish (Tr. 258). Valdivia testified that Van Voorhis stated that the Union was “no good” and why pay union dues when you could save the money (Tr. 259). He also testified that she said that Newport Meat would negotiate in good faith but would start from zero (Tr. 259). I credit the testimonies of D. Mendoza and Contreras as Van Voorhis told them on various occasions that their raises and performance reviews would be “cancelled,” “frozen,” and would not occur. I also credit Valdivia’s testimony that Van Voorhis told the employees that negotiations would start from zero as this statement was heard by several employees at various meetings they attended.

In mid-October, Drury, Van Voorhis, Cornejo, and Diaz held at least one small group employee meeting to discuss workplace issues. Gutierrez del Tirado testified that she attended one of the meetings and she recalled Drury asking the employees why they wanted a union and that “he felt very sad” (Tr. 541). Drury wanted to hear from the employees about the problems they were having. Gutierrez del Tirado spoke up at this meeting, telling them the employees had complained about their supervisor to other supervisors as well as in their responses to questions

in an annual survey distributed by Newport Meat. However, Newport Meat did not respond to their complaints (Tr. 542–543). Drury asked for a year to fix their problems. I credit Gutierrez del Tirado’s testimony as her version of events happened more likely than not. Prior to Drury’s PowerPoint slideshow where he answered the questions raised by employees, Drury as well as

5 Van Voorhis, Diaz, Cornejo, and Jara likely solicited complaints from employees. This meeting Gutierrez del Tirado attended is an example of such a solicitation.

Garcia, who was called as a witness by Newport Meat, also testified that he attended a meeting with Van Voorhis and Drury with Diaz acting a translator. Garcia testified that Van Voorhis apologized on behalf of Newport Meat for not paying attention to the employees and asked the employees to give them another chance to try to help them such as with “medical coverage and the reviews” (Tr. 1173, 1182). Jimenes testified that he attended a similar meeting with Drury, Van Voorhis, and Diaz where they wanted to help the employees (Tr. 30). Jimenes testified that an employee commented as to why they waited until that moment to talk to the

15 employees as the employees had been complaining about problems in the workplace for some time (Tr. 33). I credit Jimenes and Garcia’s testimony.

Newport Meat Announces Sanchez’ Move to Another Company

Throughout the month of October, several employees complained about their department B Supervisor Sanchez who had worked at Newport Meat for 20 years.²³ Gutierrez del Tirado testified that at one meeting she attended employees complained about their problems with supervisor Sanchez, and Diaz told them he would have an answer that afternoon. (Tr. 538–539.) D. Mendoza also attended a meeting held by Drury where an employee complained about

25 Sanchez, and Drury replied that they had handled the situation with the supervisor poorly, and they would investigate (Tr. 440).

As described previously, these employees complained prior to October about Sanchez but management at Newport Meat did not address those concerns. At the hearing, Drury acknowledged that employees had complained about Sanchez’ supervision but claimed that these complaints arose for the “first time” with Cornejo and Jara (Tr. 1122, 1155). Drury explained that employees were dissatisfied with Sanchez’ management style (Tr. 1155). Drury testified that he was “surprised” to learn of the feedback regarding Sanchez. However, Newport Meat conducts yearly electronic surveys of its employees to elicit comments about the

35 workplace, and employees testified they had complained in the surveys about Sanchez’ supervision (Tr. 1155, 1163–1164). After these complaints, sometime in October Newport Meat transferred Sanchez to Palisades Ranch (Tr. 1122). Drury testified that he decided to transfer Sanchez to Palisades Ranch due to “voids” at that location and Sanchez’ skillsets (Tr. 1156). Drury’s explanation is not credible considering the timing of events. Newport Meat only

40 decided to move Sanchez after the employees complained about his supervision when Drury, Van Voorhis, Diaz, Cornejo, and Jara were soliciting grievances from the employees.

Sometime in October, Drury, Van Voorhis, and Diaz met with employees from both departments to let them know that Sanchez was sent to another location indefinitely (Tr. 485,

²³ Sanchez appears to be a supervisor as defined by Sec. 2(11) of the Act. Newport Meat did not dispute that Sanchez was a supervisor in department B.

539). Several employees confirmed that Van Voorhis made this announcement (Tr. 328). Jimenes testified that supervisor Thomas Takeyama (Takeyama) told employees that Sanchez was on vacation and would not be returning to the Irvine facility but would be going to another company (Tr. 35, 64–65, 86).

November 1 Meeting Led by Van Voorhis, Drury, and Diaz to Discuss Health Insurance Subsidies

As background, in 2015 Newport Meat learned that its insurance provider changed regarding its health maintenance option (HMO) plan beginning in 2016. This change called for a substantial increase in premium costs to employees. Thus, Newport Meat began offering subsidies to employees who chose to stay with the HMO plan. (Tr. 1108.) Drury and Van Voorhis testified that the amount of the subsidy offered by Newport Meat varied each year. In the fall after they learned of any rate changes, Drury and Van Voorhis decided the amount of the subsidy to be offered to the employees who remained with the HMO plan. Newport Meat offered subsidies in 2015, 2016, and 2017 for each subsequent calendar year. In 2017, Newport Meat learned the premium cost for the 2018 calendar year in September or October. The subsidy offered by Newport Meat for calendar year 2018 increased from the prior year's subsidy offered. Drury testified that Newport Meat greatly increased the amount of the subsidy offered due to HMO "rate increases that were significant." (Tr. 1110, 1135.)

Prior to the representation election, on approximately November 1, Van Voorhis and Diaz held a series of 3 to 4 small groups meetings with employees to discuss the subsidy offered by Newport Meat which would reduce the amount employees would pay for the HMO plan (Tr. 930). At these meetings, attended by employees in the petitioned-for-unit, Van Voorhis read the notice to the employees in English and then Diaz read the notice in Spanish (Jt. Exh 1(d)). During these meetings, Diaz and Van Voorhis provided employees a document in both English and Spanish which explained the HMO plan premiums and subsidies.²⁴ This document, dated November 1, states, in relevant part:

NOTICE TO ALL PERSONNEL

(Excluding Teamsters Local No. 848 represented employees and employees in the voting unit)

Good news. We have spent several months reviewing ways to reduce your healthcare costs. Healthcare costs continue to increase year over year. Newport has decided to pay a much larger portion of your monthly HMO costs. We are pleased to announce on January 1, 2018, your new premium rates for medical insurance coverage will go into effect. Your cost for the HMO plan will decrease substantially from what you are currently paying.

²⁴ Van Voorhis denied reading or distributing this document to the employees (Tr. 1056–1057). Van Voorhis claimed that the document would have been posted by the time clocks even though she did not authorize the posting and does not know when the document would have been posted (Tr. 1057). Van Voorhis' credibility is greatly undermined by this exchange. Although Van Voorhis' name appears at the bottom of the document and is a notice to all personnel, Van Voorhis claimed to know little about this document.

(Jt. Exh. 1(d) (English version cited) (emphasis in original)). This document provides that employees not in the petitioned-for-unit but with the HMO plan would have a significant reduction in their overall cost due to the subsidy offered by Newport Meat. For example, eligible employees with covered family members would save \$117.92 in 2018 (in 2017 employees paid \$267.92, and in 2018 would pay \$150). Diaz testified that Van Voorhis read the letter to the employees in the meetings (Tr. 930). As for the employees in the petitioned-for-unit, Drury testified that they would receive the same subsidy as received in the prior year, and thus there would be no change in their subsidy amount in 2018 (Tr. 1110, 1134).

Also, around November 1, Van Voorhis provided employees with another notice regarding who would be eligible for the HMO subsidy offered by Newport Meat.²⁵ During small group meetings, attended by employees in the petitioned-for-unit, Van Voorhis read the notice to the employees (Jt. Exh 1(e); Tr. 1023). The notice states, in pertinent part,

**NOTICE TO ALL EMPLOYEES IN THE VOTING UNIT
(Election on Thursday, November 9)**

As you know, at this time of year we begin open enrollment for your medical plan options, including the HMO medical plan. We have begun that process with our office clerical, managerial and supervisory personnel. Ordinarily, you would be included.

Many of you have asked what the Company intends to do about the subsidy for HMO insurance on January 1, 2018.

I regret to notify you that a decision on the amount of the new subsidy paid by Newport which reduces the insurance premium you pay every two weeks will have to be postponed for all employees involved in the pending Labor Board (NLRB) Election.

This delay is required to avoid the appearance of vote-buying by Newport in view of the fact that the NLRB will hold an election on November 9. Our lawyers advised us that announcing the amount of a new subsidy at this time might be considered to be illegal (an unfair labor practice) and that we should not take this risk.

[...]

This is a serious issue. Our lawyers have also advised that any questions about this issue must be directed to and answered by a very few people so no one hears a different answer. Therefore, if you have any questions, please see either of us (Denise or Mike). Our supervisors have been instructed NOT to discuss this specific issue with anyone and to invite you to speak with us.

²⁵ Van Voorhis and Drury provided conflicting testimony as to whether this notice was provided to the employees. Drury testified that this notice was likely provided to employees via handout. In contrast, Van Voorhis testified that Newport Meat did not provide this notice to employees (Tr. 1049). I rely upon the testimony of the employees who attended the meetings as they consistently recalled receiving this handout.

(Jt. Exh. 1(e) (emphasis in original)). After Van Voorhis, Diaz read aloud the Spanish notice. Thereafter, Van Voorhis and Diaz permitted questions and answers (Tr. 896).

Contreras attended one of these meetings where Van Voorhis announced a change for the insurance costs in 2018. Contreras credibly testified that Van Voorhis informed the employees the costs for the office employees would be lowered in half, and when asked by an employee why only the office employees, she responded that they were not the ones “bringing the Union” (Tr. 473). At the end of this meeting, Contreras recalled receiving two different notices from Van Voorhis rather than only one notice (Jt. Exh. 1(d), 1(e); Tr. 471). Gutierrez del Tirado also attended a meeting concerning health care costs where she recalled receiving two notices (Jt. Exh 1(d), 1(e)). Gutierrez del Tirado testified that Drury told the employees that the reduction in healthcare costs was only for office employees, and if there was no union involvement, it would be for the petition-for-unit employees as well (Tr. 549). Cueva attended one of these meetings and recalled Van Voorhis informing the employees that insurance costs would be rising. The employees asked questions about help with their insurance costs such as with a subsidy as well as raises. Cueva recalled Van Voorhis informing the employees she could not promise anything until after the election took place when she would look at the employees’ concerns (Tr. 877–878). I credit Contreras, Gutierrez del Tirado, and Cueva’s testimony as they heard similar statements from Van Voorhis and Drury. In addition, as set forth in this decision, I cannot credit the testimony of Van Voorhis and Drury as they were not credible.²⁶

November 3 Lunch Meeting

On Friday, November 3, after Newport Meat provided the employees lunch during their 30-minute unpaid lunch period, the employees clocked back into work before they held an employee-only meeting to discuss unionization. This meeting had been coordinated and planned by warehouse employee Martinez.²⁷ Martinez and his coworkers informed employees about the meeting.

Martinez testified that another employee named Peter and he spoke to Drury in late October requesting a meeting with employees (Tr. 722, 1116, 1148).²⁸ Martinez testified that they wanted a meeting with employees to know what the other employees thought about the Union since the employees had not had an opportunity to discuss the issue amongst themselves (Tr. 722–723). In response to their meeting request, Drury initially told them that the meeting should occur outside Newport Meat (Tr. 1116–1117). However, Martinez pressed again about their need to meet in the Irvine facility. Drury responded that he would speak to Van Voorhis (Tr. 724). Later, Drury approved the meeting.

²⁶ However, I do not credit the testimony of D. Mendoza regarding the subject of the HMO subsidy as his recollection of events was unclear and appeared to combine several meetings into one (Tr. 321–325).

²⁷ Martinez’ job duties include ensuring that the departments have a constant flow of meat products to keep orders being processed. Martinez also takes products from the departments and returns it to the coolers. Thus, Martinez moves throughout the warehouse and departments during his workday. Martinez does not supervise any employees, does not hire or fire employees, and cannot discipline employees (Tr. 60, 713–715, 1037, 1116).

²⁸ Peter did not testify nor was he identified at the hearing.

Before their employee-only meeting on November 3, Drury addressed the group with Diaz acting as his English to Spanish translator.²⁹ Drury used a script for this meeting and testified that he did not diverge from the script (GC Exh. 16).³⁰ Drury began by informing the employees that “a few guys” asked him to permit the employees to talk amongst themselves.

5 Drury told the employees that he agreed and offered lunch “to make it easier.”³¹ Drury also told the employees, “the guys told me that there are a few people in the portion who are dead set on voting union—regardless of the facts and regardless of how badly it hurts everyone else. But the majority do not feel that way and wanted to talk it out among yourselves” (GC Exh. 16).³² Drury continued that they would permit the employees to meet amongst themselves for 15 to 20
10 minutes. Drury stated, “If you vote for the union because someone tells you to and there is a strike which lasts for a month or two or even longer, I think you know that “someone” will not pay your bills or feed your family. I hope everyone here decides to vote NO. You already know that warehouse and shipping are close to a 100% NO vote. You know the changes which have already been made and the legal reason a significant change cannot be announced” (GC Exh.
15 16).³³ Drury and Diaz then left the lunchroom.

During the employee-only discussion, Martinez testified that the employees discussed their views on unionization. Martinez testified that he did not speak during this meeting but that because employees thought he organized the meeting or was in charge, he was in the “middle”
20 (Tr. 756). Martinez claimed that he simply facilitated the meeting without presenting any position on unionization (Tr. 720, 757). I do not credit Martinez’ testimony that he did not speak during this meeting. Having organized the meeting, it is unlikely that he would not have said anything to the employees. Obviously, an employee would have needed to initiate the discussion after Drury left, and the employees knew that Martinez coordinated the meeting.
25 Thus, Martinez’ lack of candor undermines his testimony, and instead, I rely on the testimony of the employees who attended the meeting.

²⁹ Diaz did not create a separate Spanish script as he had in other meetings (Tr. 930).

³⁰ The script indicates that Van Voorhis, Jara, and Cornejo also attended this meeting but the evidence shows that they did not.

³¹ Drury, Van Voorhis, and Diaz testified that Newport Meat provided lunch to the employees on other occasions for various other reasons (Tr. 1038, 1121).

³² Drury testified that he did not “have any idea” about Martinez’ position on unionization in the workplace. Van Voorhis testified that she thought Martinez supported the Union, and thus was concerned about him having a meeting with all employees. Van Voorhis states, “But yes, he was—we did not feel he was for the company” based upon comments she learned from supervisors (Tr. 1038, 1066). In turn, Martinez denied informing Drury of his position on the Union, which he did not support (Tr. 727). However, Drury’s statements prior to the employee-only meeting undermines his claim of ignorance. Clearly, by the time of his speech to the employees, Drury knew that many of the warehouse employees, which includes Martinez, did not support the Union and wanted to meet with employees in the departments to convince them to not support the Union. Drury’s claims of ignorance are not credible. I also do not credit Martinez’ testimony that he never told Drury his position on the Union. Newport Meat spent a considerable amount of time to meet with employees to convey that they though unionization was wrong. Thus, in this context, it is not likely that Drury would allow the employees to meet to discuss unionization without knowing that Martinez and other employees were trying to convince the employees who supported the Union to change their minds.

³³ In direct contradiction to Drury, Martinez testified that Drury did not make a speech prior to the employee-only meeting, and only told the employees that they had 20 minutes to talk (Tr. 755). Martinez’ testimony undermines his credibility as Drury’s speech prior to the start of the meeting is an undisputed fact.

Jimenes attended the lunch time meeting.³⁴ Jimenes recalled Drury informing the employees that he was tired of the meetings, and after their employee-only meeting, they could decide if they were “going to finish with all of this or go on” with a union (Tr. 44, 122–123). After Drury and Diaz left, Martinez spoke to the employees (Tr. 44, 122). Jimenes testified that
 5 Martinez told his coworkers that Newport Meat had lowered their health insurance and fired supervisor Sanchez, and thus the employees should give Newport Meat an “opportunity” (Tr. 44). Some coworkers responded that their health insurance costs remained high (Tr. 44). D. Mendoza also testified about this meeting. He recalled Drury telling the employees he was tired and frustrated about all this information on the Union (Tr. 330). After Drury left, Martinez told
 10 the employees that Newport Meat had done positive things already such as moving supervisor Sanchez and looking at how to reduce their health insurance cost. Martinez asked the employees to give Van Voorhis and Drury a chance to take care of their complaints (Tr. 331). The meeting then ended after Diaz told the employees to return to work.

November 7 and 8 Meetings Before the Union Election

Two days before the election, Drury, Van Voorhis, and Diaz held 3 to 5 small group meetings in the kitchen with employees. Drury, Van Voorhis, and Diaz used a script for these meetings, and Diaz also served as the English to Spanish translator (GC Exh. 10; Tr. 1024,
 20 1115). According to the script, Diaz presented an approximately 10-minute PowerPoint slideshow in English and Spanish on election voting procedures (R. Exh. 7 and 8).³⁵ Diaz did not know who prepared the original contents of the slideshow and did not know if he included a sample ballot as mentioned in slide 9 or if he showed the employees a physical sample ballot. Thereafter, he asked the employees to give him a chance to make their jobs easier, that “this
 25 whole union campaign process has put my learning about you and your concerns and issues into overdrive,” and voting against the Union would give him the “best opportunity to show you what I can do for and with you” (GC Exh. 10).

After Diaz spoke, Drury showed the employees a Newport Meat-created video, which
 30 had also been sent to the employees’ homes. This video shared Newport Meat’s opinion on the vote as well as the ramification for voting for the Union including negotiations if the Union is elected (Tr. 1144).³⁶ After the video was shown, Drury informed the group that Van Voorhis and he had met with as many employees as they could on Monday and Tuesday of that week (November 6 and 7) to answer questions, especially about the health insurance subsidy they had
 35 announced the prior week. Drury also reminded the employees that they had met amongst themselves after lunchtime that last Friday, November 3. Drury stated, “Last week, in the Friday meeting, we understand that a majority of employees said they were willing to give Newport, Denise, Robert, and me a chance. The message I got from many of you after that meeting and on Monday and Tuesday of this week is that you do not want to take a chance on
 40 losing in bargaining the way other Sysco employees have when they made the Teamsters their

³⁴ Jimenes testified that Van Voorhis was present during this meeting. However, other witnesses do not recall her being at this meeting.

³⁵ Diaz testified that they held one meeting in English and two meetings in Spanish (Tr. 932).

³⁶ Van Voorhis could not recall whether the video was shown at these meetings (Tr. 1063). Diaz testified that he could not recall any details about the video such as what it was about, in what language it was presented and how long it was (Tr. 934–935). Van Voorhis and Diaz’ lack of recollection from these meetings undermines their credibility as to what occurred.

bargaining agent” (GC Exh. 10). Drury told the employees that the warehouse employees planned to vote against the Union but that they needed the department employees to also vote against the Union. Drury promised that Newport Meat would be better, and that improvements would be announced. On cross-examination, Drury could not recall what improvements to which he was referring in his speech (Tr. 1146–1147). Drury closed his speech by acknowledging that he learned more about the employees’ work conditions in the past 5 weeks than in the past 5 years, and that Newport Meat should not have been out of touch with the employees.

Van Voorhis then spoke about the health insurance subsidies, telling employees that she could not make any promises as to what Newport Meat would do but that legally, if the employees voted against the Union, they could implement the same health insurance subsidies for the employees in the petitioned-for-unit. These meetings lasted 30 to 45 minutes each.

Garcia testified that he attended one of these meetings along with approximately 40 to 50 employees in the dining room. During the meeting, Garcia testified that Van Voorhis told the employees about the election process and to vote for what was good for them (Tr. 1175). Cueva attended one of these meetings and testified similarly to Garcia. Cueva also recalled Van Voorhis telling the employees that if the Union did not win, she would see what the employees’ problems were. Drury promised to the employees that he would be more involved with Van Voorhis’ decisions (Tr. 879).

November 8 and 9 Meetings After Election Was Cancelled and Postponed

Due to the filing of unfair labor practices by the Union, the Region 21 Regional Director cancelled and postponed the November 9 representation election. Thus, Drury, Van Voorhis, and Diaz met with the employees to announce that the election would not occur. Van Voorhis and Drury also issued a letter to the employees on November 8 (Jt. Exh. 1(f)). This letter states in relevant part:

LATEST NEWS ON THE NLRB ELECTION

The Election has been Cancelled and Postponed!

As you know, several weeks ago, we made arrangements with the NLRB for them to hold a secret-ballot election so that you can decide whether to make the Teamsters your legal collective bargaining representative. As part of those arrangements, the Teamsters agreed with us that the election should be held tomorrow, Thursday, November 9.

Ever since the Teamsters first filed their election petition in October, we have met with you to share important, factual information with you so that you would be fully prepared to cast an intelligent ballot when it came time for you to vote. There is no doubt in our minds that information clearly shows that it is in your best interest to vote against representation by the Teamsters and to remain nonunion and union free.

[....]

(Jt. Exh. 1(f) (**emphasis in original**)). Both Van Voorhis and Drury's names appear at the end of this letter.

On November 9, Van Voorhis, Drury, and Diaz held 3 to 5 small group meetings with employees in the kitchen, conference room, and warehouse. The meetings lasted 15 to 20 minutes each. In the first meeting, approximately 50 employees attended and in each of the other meetings, approximately 15 employees attended (Tr. 896-897). Van Voorhis read the following script verbatim, which states in relevant part:

NEWPORT MEAT COMPANY

NOTICE TO PROCESSING AND WAREHOUSE

Today, November 9, you were supposed to be able to exercise your right to vote and to vote for or against representation by the Teamsters Union. The Teamsters, however, did not honor this right, and at the last-possible minute, they fled a charge with the NLRB to block the election. Unfortunately, the NLRB agreed with the Teamsters' request and cancelled the election.

Many of you have expressed anger at the Teamsters' moves, and you have asked us what we can do. You have a very-good and fully-legitimate reason to be angry. The Teamsters agreed in writing to have the election on November 9, and they showed their true colors when the Teamsters broke their agreement.

[...]

Your hands, however, are not tied. The Teamsters relied on authorization cards, which some of you must have signed, in order to support the election petition. Those cards are apparently currently in the NLRB's hands.

Some of you have voluntarily said that you want to get your cards back or to cancel your cards. This probably will not work because the NLRB has your cards, and the NLRB will probably only return the cards to the Teamsters if the union asks for them back. But all is not lost, because there is something which may work.

We cannot tell you what to do or not do when dealing with a union, but if we were in your position, we would write a letter to the Teamsters and ask, or even demand, that they pull out and leave all of us alone. The Teamsters had their chance to legitimately win your support in an election, but they chose to disrespect you and your rights and to drag this matter out as long as they can. The Teamsters know that, if they

allowed the election to take place, you were going to vote overwhelmingly “NO” union. The Teamsters’ answer to your decision to vote against them – no election.

5 Here again, we cannot tell you what to do or not do, and we are not telling or asking you to do anything, but if we were you, we would send a letter, similar to the one attached, to the Teamsters. I would send a signed letter on my own, or I would get my fellow employees to sign a joint letter and send it. Perhaps, if the Teamsters get enough letters, they
10 will finally honor your choice and your wishes, and the Teamsters will pull their petition and leave us alone.

(GC Exh. 2, p. 1 (emphasis in original)). Diaz read a Spanish version of the script which he created (R. Exh. 5). However, Diaz’ Spanish version is missing the following sentence: I would
15 send a signed letter on my own, or I would get my fellow employees to sign a joint letter and send it. Diaz could provide no reason for why he failed to include this sentence in his translation. The above notice was distributed to the employees.

20 Along with this notice were letters addressed to Patrick Kelly (Kelly), secretary-treasurer of the Union. The English-version of the letter states:

Dear Mr. Kelly:

25 I am an employee of Newport Meat Company, and I was scheduled to vote in the NLRB election on November 9. As I understand it, you are the Teamster official who filed the election petition, and I assume you are one of the Teamsters who made the decision to block the election and not allow us to exercise our right to vote.

30 We the employees of Newport Meat are no longer interested in having the Teamsters represent us, and had we been given the chance, we were going to vote overwhelmingly against the Teamsters in the election.

35 We demand that the Teamsters honor our choice and our wishes and do whatever is necessary to immediately reschedule the election. If you cannot get the election rescheduled immediately, we demand that you withdraw the election petition.

40 _____
Employee Signature

(GC Exh. 2, p. 2). Another version of a letter to Kelly provided for multiple employees to sign the letter (GC Exh. 2, p. 4).

45 Drury and Van Voorhis provided inconsistent testimony regarding these letters. Drury testified that he had never seen the letters attached to the script (Tr. 1166). Van Voorhis testified that she did not have the letters with her at this meeting and denied handing out any

documents to employees at this set of meetings (Tr. 1029). On cross-examination, Van Voorhis testified that she could not recall if there was an attachment to the letter despite testifying that she read from the script verbatim which cites to suggested letters she was providing to the employees (Tr. 1065). Diaz did not testify about whether these letters were distributed to employees at these meetings. I do not credit Drury or Van Voorhis' testimonies regarding the letters. It is clear from the script as well as numerous employees' testimonies that Newport Meat did provide these sample letters to employees.

Valdivia credibly testified that Drury and Van Voorhis passed out these letters to employees during the meeting he attended; the meeting Valdivia attended occurred in his department with 5 to 6 other employees (Tr. 264–265; GC Exh. 2). Gutierrez del Tirado testified that Van Voorhis distributed the letters and asked the employees to sign the letters to return their authorization cards. Cueva testified that he attended the meeting after the election was cancelled. During this meeting, the employees asked about the insurance premiums rising. Van Voorhis responded that they needed to get another date for voting. She also encouraged the employees to ask the Union for another date for voting and to pressure a vote (Tr. 880). During the meeting Durkee attended, Van Voorhis spoke about the employees signing a "petition to have the Union card withdrawn" (Tr. 777). Van Voorhis told the employees that it was their choice to sign the petition. Jimenes testified that Drury told the employees that they had all been tricked by the Union, and that he had some letters to sign so that the Union would return the employees' signed authorization cards (Tr. 46, 116). Jimenes testified that Drury told the employees he could not tell them what to do but that he would ask for the authorization card back from the Union (Tr. 117). Jimenes testified that Drury and Van Voorhis distributed letters to be signed but he did not sign the letter (Tr. 46). Martinez also admitted he received these letters during the meeting he attended led by Van Voorhis (Tr. 740).

Martinez Encourages Employees to Withdraw Support for the Union

After the election was blocked, Martinez asked employees in both departments to sign the letters to Kelly to obtain their authorization cards from the Union. Martinez would pass these letters out during work time as well as during lunch and breaks. Martinez testified that he would pass out either Spanish or English versions of the sample letters (GC Exh. 2, pp. 2–5). Martinez asked for employees, primarily in Spanish, to sign both the individual letter and group letter. Martinez testified that he told employees that they should not be stopped by the Union, and they should try to get another solution (Tr. 766). Many employees testified that Martinez approached them while they were working after the election was cancelled, asking them to sign the same letter to Kelly distributed by Van Voorhis and Drury. Several employees testified that Martinez appeared to be working with Van Voorhis and Drury because he used the same letters they distributed during their meetings and he was on duty time when he asked employees to sign the letters.

D. Mendoza testified that Martinez asked him about his Union authorization card after the election had been cancelled but he refused to sign the letter (Tr. 334; GC Exh. 2, p. 5). Martinez then went to other employees to obtain their signatures (Tr. 336). Valdivia testified that Martinez also showed him the letters to Kelly distributed by Van Voorhis and Drury (Tr. 266). Martinez told Valdivia that if he wanted his authorization card back, he should sign the letter, but Valdivia refused (Tr. 266, 268). Jimenes testified that on about the morning of

November 13 Martinez asked employees in his department to sign the letters (Tr. 51). Since the employees no longer had copies of the letters, Martinez told the employees he had more copies (Tr. 52–53). Gutierrez del Tirado testified similarly to D. Mendoza, Valdivia, and Jimenes (Tr. 554, 557; GC Exh. 2, p. 3).

5 Martinez did not deny asking employees to sign the same letters distributed by Van Voorhis and Drury. However, Martinez was not truthful, providing contradictory and confusing testimony, regarding the origins of the letters. Martinez’ testimony suggests that he found these letters on the internet and he decided on his own volition to distribute the letters. Martinez testified coworkers and he found the sample letters to Kelly on the internet (Tr. 734). However, when questioned on cross-examination about who typed the letters and who printed out the letters, Martinez testified that his coworkers and he did not type the letters but that they were found online; in fact, Martinez claimed that his friend “Randy” found this letter online with Kelly’s name on it or Randy only showed him a picture of the letter on Randy’s phone (Tr. 759).³⁷ Martinez claimed that this letter was found online customized to the blocked representation election at the Irvine facility. Such testimony cannot be believed. Obviously, customized letters would not be found online but rather someone needed to have taken a sample letter, possibly found online, and customized the contents for the specific situation. When pressed on who added this specific information, Martinez claimed to not know who added in this information (Tr. 760). When pressed as to how and from whom he received these specific letters with customized information, Martinez testified that “the employees” and “Randy or you know, we just got it” provided them to him. As for the Spanish versions of the letters to Kelly, Martinez claimed to not know from where they came. As for the letters which permitted multiple signatures, Martinez did not know who prepared the letters and from where they came. (Tr. 762.) Based on Martinez’ lack of truth in testifying about the sample letter, I decline to credit any portion of his testimony regarding these letters as he is not trustworthy.

As for whether Martinez independently passed out the letters or worked at the behest of Newport Meat, Martinez claimed that one other employee and he spoke to Drury and Van Voorhis about the letters and told them that they planned to pass out these letters (Tr. 735–736). Martinez testified that Drury and Van Voorhis only told them that they must pass out the letters on their own time, not while on duty (Tr. 737). Van Voorhis and Drury denied ever asking Martinez to ask employees to sign letters asking for their authorization cards back. A close look at the credited evidence shows that it is more likely than not that Van Voorhis and Drury knew that Martinez did not support the Union and worked with him to have the employees sign the letters to obtain their authorization cards from the Union which would in effect send a message to the Union to withdraw their election petition. Martinez, Van Voorhis, and Drury testified vaguely about the origins of the letters. As set forth above, Van Voorhis and Drury testified contrary to the evidence about the letters and their distribution at the meetings they held. Along with Martinez’ untrustworthy testimony about the origins of the letter, Van Voorhis and Drury cannot be credited that they did not know about Martinez’ action of asking employees to sign the letters. Looking at the overall evidence, I can only conclude that Van Voorhis and Drury worked with Martinez to ask the employees to obtain their authorization cards. Or at the very least, Van Voorhis and Drury turned a blind eye towards Martinez’ actions on their behalf.

³⁷ Randy did not testify nor was he identified at the hearing.

November 15 Meeting to Discuss Health Insurance Subsidy

On November 15, Van Voorhis and Drury held another series of 3 to 4 meetings with small groups of employees to discuss the issue of the insurance subsidy. Van Voorhis read from the following notice:

NOTICE TO ALL EMPLOYEES IN THE VOTING UNIT

As you all know, at this time of year we begin open enrollment for your medical plan options, including the HMO medical plan. We have begun that process with our office clerical, managerial and supervisory personnel. Ordinarily, you would be included.

[...]

I regret to notify you that a decision on the amount of the new subsidy paid by Newport which reduces the insurance premium you pay every two weeks will have to be postponed for all employees in the voting unit.

This delay is required to avoid the appearance of vote-buying by Newport in view of the fact the NLRB will no doubt reschedule the election for a later date. [...]

(GC Exh. 13). Van Voorhis denied providing this notice to employees (Tr. 1048–1049). Diaz read from a Spanish version which he translated although this document is dated November 10 in error (GC Exh. 19; Tr. 922–923). Drury and Van Voorhis testified that employees in the petitioned-for-unit never received the increased subsidy as Newport Meat’s other employees even after the election was postponed (Tr. 1105, 1138). Drury claimed that the insurance subsidy could not be provided to these employees because Newport Meat does not make mid-year adjustments.³⁸

Newport Meat Delays Employee Pay Raises and Performance Reviews

As background, Newport Meat conducts annual performance reviews on or about an employee’s employment anniversary date. At the same time, an employee may receive a salary increase based on his performance and tenure, and this salary increase would be retroactive to the employee’s anniversary date (Tr. 1034, 1123, 1160). Such reviews should be within 2 weeks of the employees’ anniversary date.

However, in October and November, Drury and Van Voorhis testified that for those employees’ whose anniversary dates occurred in those months, those employees should have received their performance reviews, but no salary increases so as not to be “potentially influencing” during the critical period (Tr. 1069, 1160). Van Voorhis and Drury did not know whether those performance appraisals occurred in October and November 2017. They testified that those employees who would have received wage increases from October and November,

³⁸ In the fall of 2018, Newport Meat provided the petitioned-for-unit employees the same subsidy it provided to nonvoting employees in the fall of 2017, and the nonvoting employees’ subsidy remained the same. Thus, all employees received the same subsidy in calendar year 2019 (Tr. 1055, 1139).

received those increases, retroactive to their anniversary date, in February or March 2018. Van Voorhies testified that she informed employees that during the critical period, Newport Meat would not be giving any wage increases due to a perception of buying votes (Tr. 1075–1076).

5 Several employees testified that they did not receive their performance reviews on or about their anniversary date and did not receive a corresponding raise until later. Valdivia testified that he would receive a raise every anniversary based on his work attendance and performance (Tr. 269). Valdivia testified that he did not receive a raise in November on or about his anniversary date of November 10 but did receive a raise in February 2018 with
10 retroactive pay (Tr. 269–270). Contreras testified that he did not receive a performance appraisal in November on or about his anniversary date, but his performance review eventually occurred in February 2018 (Tr. 481–482). Contreras’ supervisor recommended a raise, but this raise was not retroactive to November (Tr. 480–482).

15 III. Discussion

8(a)(1) Allegations

General Legal Principles

20 Section 7 of the Act includes the rights of employees “to form, join, or assist labor organizations [. . .] and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection [. . .]” Section 8(a)(1) of the Act provides that it is an unfair labor practice for an employer “to interfere with, restrain, or coerce employees in the
25 exercise of rights guaranteed in Section 7.” However, Section 8(c) of the Act provides that the “expressing of any views, argument, or opinion [. . .] shall not constitute or be evidence of an unfair labor practice under any of the provisions of this Act, if such expressions contains no threat of reprisal or force or promise of benefit.” The Supreme Court and the Board have recognized that Section 8(c) of the Act “implements the First Amendment by requiring that the
30 expression of ‘any views, argument, or opinion’ shall not be ‘evidence of an unfair labor practice,’ so long as such expression contains ‘no threat of reprisal or force or promise of benefit’ in violation of Section 8(a)(1).” *NLRB v. Gissel Packing Co.*, 395 U.S. 575, 580 (1969).

35 In the context of a union organizing campaign, the Supreme Court in *Gissel* explains how Section 8(a)(1) and 8(c) of the Act should be balanced. An employer is free “to make a prediction as to the precise effects he believes unionization will have on his company” but “the prediction must be carefully phrased on the basis of objective fact to convey an employer’s belief as to demonstrably probable consequences beyond his control [. . .] [A]n employer is free only to tell what he reasonably believes will be the likely economic consequences of
40 unionization that are outside his control, and not threats of economic reprisal to be taken solely at his own volition.” *Id.* at 580–581. “An employer, who has control over [the employer-employee] relationship and therefore knows it best, cannot be heard to complain that he is without an adequate guide for his behavior. He can easily make his views known without engaging in “brinkmanship” when it becomes all too easy to overstep and tumble [over] the
45 brink.” *Id.* at 582.

A. Solicitation of Employee Grievances

The General Counsel alleges at complaint paragraphs 6(a), 6(b), 6(d), 7(b), 9(a), and 10(a) that Cornejo, Diaz, Drury, and Van Voorhis violated Section 8(a)(1) of the Act by soliciting grievances and impliedly promising to remedy those grievance during the critical period at various meetings. Newport Meat argues that these supervisors and agents' testimonies should be credited, and thus, found not to have violated the Act.

The Board has held that “generalized expressions of an employer’s desire to make things better have long been held to be within the limits of campaign propaganda.” *MacDonald Machinery Co.*, 335 NLRB 319, 319 (2001). However, promises of improvements in specific terms and conditions of employment are distinguishable. See *KAG-West, LLC*, 362 NLRB 981, 981 fn. 1 (2015). “The solicitation of grievances in the midst of a union campaign inherently constitutes an implied promise to remedy the grievances.” *Maple Grove Health Care Center*, 330 NLRB 775, 775 (2000), quoting *Capitol EMI Music*, 311 NLRB 997, 1007 (1993). See also *MEK Arden, LLC*, 356 NLRB 899, 905 (2017). The Board has further explained that the absence of “a commitment to specifically take corrective action does not abrogate the anticipation of improved conditions expectable for the employees involved.” *Id.* The Board looks at a totality of the circumstances when determining whether a violation may be found when an employer impliedly promises benefits to address employee dissatisfaction without the need for union representation. *Multi-Ad Service, Inc.*, 331 NLRB 1226, 1227, 1241 (2000). However, “[a]n employer may rebut the inference of an implied promise by, for example, establishing that it had a past practice of soliciting grievances in a like manner prior to the critical period, or by clearly establishing that the statements at issue were not promises.” *MEK Arden*, supra, quoting *Mandalay Bay Resort & Casino*, 355 NLRB 529, 529 (2010).

Upon learning of the representation petition, Drury and Van Voorhis met with small groups of employees to inform the employees of the petition as well as their opinion on unionization. Drury and Van Voorhis relied on a script and did not deviate from this script. As set forth in Drury and Van Voorhis script, they made certain from the start of the critical period that they did not want the employees to select the Union as their representative. Such is Newport Meat’s right under Section 8(c). The credited evidence from the employees in attendance as well as their scripts demonstrate that at these initial meetings Van Voorhis and Drury did not solicit grievances or make any promises if the employees avoided unionization. Although employees made comments to Van Voorhis and Drury, they did not answer any of these questions at that time. Van Voorhis and Drury made clear that they would be responding the employees’ questions later, which they did. Thus, I do not find that at these initial meetings Drury and Van Voorhis solicited employee grievances and either impliedly or explicitly made promises if the employees did not unionize. I dismiss complaint paragraph 9(a).

In early October, after Van Voorhis and Drury’s initial meetings with employees, Diaz met with small groups of employees to discuss unionization at Newport Meat. Diaz, who had only started employment with Newport Meat on October 2 to serve as a liaison between Newport Meat and the employees, asked employees to give Newport Meat a second chance and 6 months to address problems in the workplace. Under these circumstances, Diaz did not violate the Act. The Board has held that statements which are vague, do not promise anything in particular, and are generalized requests for more time are “within the limits of permissible

campaign propaganda.” *National Micronetics*, 277 NLRB 993, 993 (1985) (citing *Allied/Egry Business Systems*, 169 NLRB 514, 517 (1968)). Thus, I dismiss complaint paragraph 7(b).

During the various meetings held by Cornejo in mid- and late October to discuss the Act and collective bargaining, Cornejo asked the employees why they wanted a union and asked them what their concerns were in the workplace. Along with the duty to educate employees on labor law, Cornejo solicited grievances on behalf of Newport Meat. The employees expressed concerns about wanting respect from Newport Meat as well as better wages and benefits. These employees also expressed concerns about being treated badly by supervisors. Many employees testified that prior to the representation petition Newport Meat only conducted annual surveys and never engaged in discussions with employees about the workplace. Despite these annual surveys, Newport Meat did not act or respond to employee complaints in these surveys. Cornejo did not respond to the employees’ concerns at those meetings. As the labor consultant hired by Newport Meat, it is reasonable to assume that Cornejo, acting as an agent as defined by Section 2(13) of the Act, would convey those grievances to Drury and Van Voorhis who later removed Sanchez and spoke to employees about their benefits. Drury conducted several small group meetings to address the complaints made by employees. “The solicitation of grievances alone is not unlawful, but it raises the inference that the employer is promising to remedy the grievances.” *Amptech, Inc.*, 342 NLRB 1131, 1137 (2004), *enfd.* 165 Fed. Appx. 435 (6th Cir. 2006); see *Uarco, Inc.*, 216 NLRB 1, 2 (1974). Under the totality of the circumstances, although Cornejo made no promises to the employees, the inference raised by his solicitation is that Newport Meat would remedy these issues. Thus, I find that Newport Meat violated Section 8(a)(1) as described in complaint paragraphs 6(a), 6(b), and 6(d) by Cornejo soliciting grievances.

Thereafter, Drury held captive audience meetings with employees to discuss workplace issues. During these meetings, Drury asked employees why they wanted a union, wanted to know what their problems were, and told the employees that “he felt very sad.” In response, Gutierrez del Tirado complained about their supervisor, and Drury responded by asking for a year to fix their problems. In these circumstances, I find that Drury implicitly promised to correct the issue the employees were having with their supervisor if they would give him a year. Drury implies to employees that if the employees reject unionization, he will correct their problems with their supervisor. In such instances, the Board finds violations. Drury’s statement to the employees is not a generalized request for more time but is in response to a specific complaint by employees about their supervisor.³⁹ Moreover, this inference that Drury is implicitly promising to correct the grievance and thus influencing employees to vote against the Union is evident by Newport Meat’s prior disregard for the employees’ complaints by their supervisor which they conveyed via employee survey and other supervisors. Thus, I find that Newport Meat violated Section 8(a)(1) as described in complaint paragraph 10(a) by Drury soliciting grievances and promising benefits at this meeting to discuss workplace issues.

³⁹ Newport Meat argues that Drury’s statement is a generalized request for more time which is lawful (R. Br. at 43, citing *Pickering & Co.*, 254 NLRB 1060, 1065 (1981)). However, as credited, Drury’s statement came in response to specific complaints which he solicited at this meeting.

B. Promise to Improve Employee Terms and Conditions of Employment

The General Counsel alleges at complaint paragraphs 7(a), 7(c), 8(a), 8(b), 9(b), 10(c), and 10(f) that Van Voorhis, Drury, and Diaz promised to grant benefits to employees to coerce them into voting against union representation in violation of Section 8(a)(1) of the Act.

Newport Meat argues that the supervisors' statements were lawful. The General Counsel also alleges at complaint paragraph 15(a) that Newport Meat violated Section 8(a)(1) of the Act by authorizing Martinez to conduct a lunch time meeting with employees to solicit employees to reject the Union by telling the employees that Newport Meat would improve benefits and had improved employees' working conditions.

In *NLRB v. Exchange Parts Co.*, 375 U.S. 405, 409 (1964), the Supreme Court stated, "The danger inherent in well-timed increases in benefits is the suggestion of a fist inside the velvet glove. Employees are not likely to miss the inference that the source of benefits now conferred is also the source from which benefits must flow and which may dry up if it is not obliged." The Supreme Court continued, "The conferral of employee benefits while a representation election is pending, for the purpose of inducing employees to vote against the union" interferes with the employees' right to organize. The analysis for a claim of benefits that are promised, announced, or granted to influence employees in their choice of bargaining representative is motive based. *Network Dynamics Cabling, Inc.*, 351 NLRB 1423, 1424 (2007). However, such a promise, announcement or grant of benefits is not automatically unlawful if the employer can show other factors that governed its decision. *American Sunroof Corp.*, 248 NLRB 748, 748 (1980), modified on other grounds 667 F.2d 20 (6th Cir. 1981). First, the General Counsel must prove by a preponderance of the evidence "that employees would reasonably view the grant of benefits as an attempt to interfere with or coerce them in their choice on union representation." *Southgate Village Inc.*, 319 NLRB 916, 916 (1995). If the General Counsel meets this burden, the employer must demonstrate a legitimate business reason for the timing of the benefit. For example, an employer may show that the benefit was "part of an already established Company policy and the employer did not deviate from the policy upon the advent of the union." *American Sunroof*, supra.

In early-October, at one meeting Diaz held along with Cornejo, Diaz told the employees that since he was new to Newport Meat, he asked them to give him 6 months so he could help them with wages and health insurance. Diaz reiterated his promise to employees during his speech the two days before the election. Diaz told the employees that he wished for them to give him an opportunity to make their jobs easier and voting against the Union would give him a chance to show them what he can do for them. I find that employees would reasonably view Diaz' promise to assist them with wages and healthy insurance as an attempt to discourage their support for the Union. Diaz held captive audience meetings with employees to convince them he wanted to help them, and then attempted to end the critical period with a promise to make their working conditions better, impliedly promising to help them with their wages and benefits. Under these circumstances, employees would reasonably view these promises as an attempt to

discourage support for the Union.⁴⁰ Thus, I find Newport Meat violated Section 8(a)(1) as described in complaint paragraph 7(c).

In mid-October, Drury held a set of small group meetings to discuss questions raised by employees in prior discussions. With regard to health insurance, Drury repeatedly informed the employees that Newport Meat was considering changes which would enhance their plans and plan experience. Drury told the employees that they could not share with the employees their thoughts as that would be seen as bribery but if they voted against union representation there would be no impediment against Newport Meat implementing these unannounced changes for all employees. Drury told the employees that they had been listening closely to their comments and concerns, and if they would vote against unionization, they could lawfully make the changes and improvements as they had been discussing. These comments by Drury come directly from his PowerPoint slide show. Jimenes credibly testified that Drury told these employees they could lower their health insurance costs and possibly give them a raise if they voted against union representation. Here, based upon Drury's script as well as Jimenes' testimony, during the critical period, Newport Meat clearly attempted to induce employees to vote against the Union by promising improvements and changes for the better with their health plan along with other benefits such as a raise. It is clear from the record that Newport Meat timed these announcements to induce employees to vote against unionization. Furthermore, during the meetings of November 7 and 8, the day before the election, Drury told employees that improvements would be announced, right after he told employees that the warehouse employees planned to vote no and needed the department employees to vote no as well. Although Drury did not specifically state which improvements would be made, the course of his conversations with the employees indicates that these improvements would include employees' benefits as discussed in their prior meetings. Thus, I find that Newport Meat violated Section 8(a)(1) as described in complaint paragraphs 10(c) and 10(f).

During a discussion regarding health insurance costs in November, Van Voorhies informed the employees the HMO plan costs would be rising. Van Voorhis also told the employees that premiums would be lowered in half only for office employees due to an increase in subsidy Newport Meat planned to offer. When asked why the warehouse and department employees were not included, Van Voorhis responded that the office employees were not bringing in the Union. At another meeting, employees asked questions about the HMO plan subsidy, and Van Voorhis told the employees that she could not promise anything at the time but would look at their concerns after the election. Gutierrez del Tirado testified that Drury told the employees that the subsidy offered to the office employees would be for the petitioned-for-unit employee as well if there was no union involvement. Again, these employees were notified of a substantial increase in the HMO plan subsidy to office employees and informed that their subsidy would be reviewed after the election. Newport Meat told employees that their HMO plan costs would be lowered in half due to the subsidy they offered if they had not engaged in organizing. At a meeting one or two days before the election, Cueva recalled Van Voorhis

⁴⁰ Newport Meat argues that Diaz' statement during the meetings before the November 9 election were not unlawful as the statement does not constitute an implied promise of benefits (R. Br. at 38, citing *Pickering & Co.*, 254 NLRB 1060, 1065 (1981)). I disagree as the credited evidence shows that Diaz' initially asked for more time so he could help the employees with their wages and health insurance. Diaz followed up at the final meetings before the election with the same commentary such that he implied that with more time, he would help improve their wages and health insurance.

telling the employees that if the Union did not win, she would see what the employees' problems were, and Drury promised that he would be more involved with her decisions. Van Voorhis and Drury's announcements right before the election would leave employees with the reasonable impression that they would receive the increased subsidy if they did not vote for the Union and but for the Union, they would have also received the increased subsidy. The timing of the announcement of reduction in healthcare costs and the promise to look at employees concerns after the election violated Section 8(a)(1) of the Act as described in complaint paragraph 9(b).

However, I dismiss complaint paragraphs 7(a) and 8(a) as I did not find any credible evidence that Diaz and Van Voorhis conducted a meeting in October where they promised to improve employees' terms and conditions of employment if they did not support the Union.

Prior to determining whether Newport Meat violated the Act as alleged at complaint paragraph 15(a), the question must be answered as to whether Martinez is an agent of Respondent as defined by Section 2(13) of the Act. In so doing, the common law rule traditionally applied by the Board is that of "apparent authority." *Alleghany Aggregates Inc.*, 311 NLRB 1165, 1165 (1993). The Board looks at whether under the circumstances, the employees would reasonably believe that the alleged agent was acting on behalf of management. *United Scrap Metal Inc.*, 344 NLRB 467, 474 (2005). In other words, "whether under all the circumstances the employees would reasonably believe that [a person] was reflecting company policy and speaking and acting for management." *Community Cash Stores*, 238 NLRB 265, 265 (1978).

In the instant case, employees reasonably believed Martinez acted on behalf of Newport Meat due to the employee-only meeting he scheduled as well as his attempts to have employees sign the letters distributed by Van Voorhis and Drury during duty time. As for the employees-only meeting, after Martinez received approval to hold the meeting, Martinez, not supervisors, then informed the employees of this meeting to be held on duty time after lunch. Next, the meeting began with Drury lecturing the employees on what he knew about the employees' positions on the Union, and that the warehouse employees were against the Union and needed the department employees to agree. Thereafter, Martinez, a warehouse employee, led the meeting. Martinez whose work moves between the warehouse and the departments is a constant presence for the department employees. During this meeting Martinez attempted to convince the employees to give Newport Meat a chance since they had lowered the amount employees would pay for insurance (announced two days prior) and had removed Sanchez as their supervisor. Later, with Drury's knowledge, Martinez asked employees to sign the anti-union letters given to them by Van Voorhis and Drury. Based upon the totality of the circumstances, a reasonable employee would believe that Martinez spoke on behalf of Newport Meat. Martinez's actions of convincing employees to give Respondent another chance during a meeting while on duty time and asking employees to sign the letter demanding their signed authorization cards from the Union mirrors the actions of Newport Meat's supervisors and agents. Such consistent action supports a finding of apparent authority. *Pan-Oston Co.*, 336 NLRB 305, 306 (2001).

Accordingly, I find that Martinez was an agent of Newport Meat as defined by Section 2(13) of the Act.⁴¹

Next, having found that Martinez was an agent of Respondent, it must be determined whether Newport Meat violated the Act when having Martinez solicit employees to reject the Union by telling the employees that Newport Meat would improve benefits and had improved employees' working conditions. Here, Martinez attempted to coerce the employees into voting against the Union by reiterating Newport Meat's actions of removing Sanchez from the workplace after soliciting grievances from employees and Newport Meat's pronouncements regarding health care costs. I find that employees would reasonably view Martinez' reminders of Newport Meat's actions as an attempt to influence them to not vote for the Union and give Newport Meat another chance. Thus, I find that Newport Meat violated Section 8(a)(1) of the Act as alleged in complaint paragraph 15(a).

C. Threats Concerning Negotiations

The General Counsel alleges at complaint paragraphs 6(e), 11, 12(b), 12(e), and 12(g) that Cornejo, Jara, and Mitchell during various meetings threatened to reduce employees' existing wages and benefits by telling employees negotiations would begin at zero if the Union is selected as their representative. Newport Meat argues that these supervisors and agents' testimonies should be credited, and thus, found not to have violated the Act. Moreover, Newport Meat argues that any statements made by the supervisors and agents was not coercive and made in the context of normal give and take of negotiations.

During a union organizing campaign, employer statements to employees that bargaining will start from "zero" is a "dangerous phrase" which carries with it "the seeds of a threat that the employer will become punitively intransigent in the event the union wins the election." *BP Amoco Chemical-Chocolate Bayou*, 351 NLRB 614, 617 (2007), citing *Federated Logistics & Operations*, 340 NLRB 255, 255 (2003), enfd. in relevant part 400 F.3d 920 (D.C. Cir. 2005). In context, the use of such statement effectively threatens employees with loss of existing benefits and "leave[s] them with the impression that what they may ultimately receive depends in large measure on what the union can induce the employer to restore." *Id.* In contrast, statements which inform employees that they can lose benefits in bargaining can be lawful

⁴¹ Newport Meat, citing *Knogo Corp.*, 265 NLRB 935 (1982), argues that Martinez did not act as its agent (R. Br. at 49–50). In *Knogo*, an employee circulated an anti-union petition amongst her employees during work time. Once a supervisor learned of the employee's conduct, he immediately reprimanded her for engaging in such activities while on duty. The Board found that because the employer immediately halted the employee's activities during work time, the employer was neither acquiescing nor condoning the anti-union petition. In contrast, Martinez asked employees to sign the anti-union letters, distributed by Van Voorhies and Drury, while he was on duty time. Drury knew Martinez intended to ask employees to sign the anti-union letters, even though Drury told him to ask while he was not on duty time. In addition, Martinez coordinated the after-lunch meeting amongst employees to discuss the Union where Drury provided great details as to his impression of the decisions of the employees on unionization, and then he permitted the employees to speak. Martinez then spoke to the employees. Thus, the facts presented here are unlike those in *Knogo*. Other decisions cited by Newport Meat are fact-specific and not dispositive here. (R. Br. at 50, citing *Division of Plessey Material Corp.*, 262 NLRB 1392 (1982), and *Green Atlantic & Pacific Tea Co., Inc.*, 167 NLRB 776 (1967)).

where such statements “merely [state] what could lawfully happen during the give and take of bargaining.” *Id.*

5 In this matter, Gutierrez del Tirado testified that Cornejo told the employees that in negotiations everything such as benefits would be on the table and “they were going to start from zero.”⁴² Valdivia testified that Jara also told the employees that negotiations would “start at zero” with a blank paper.⁴³ Mitchell, who informed the employees that he would be chief negotiator for Newport Meat, characterized the employees as “losers” if they voted for the Union, and told the employees that negotiations would start at “zero.” He also informed the employees that he would start lowering their salaries and take away benefits. Mitchell also told 10 Jimenes that he could lower his salary to match Palisades Ranch employees’ salary. Gutierrez del Tirado testified that Mitchell said that negotiations would start at zero for everything including benefits and wages. In addition, Mitchell admitted that he held up a blank piece of paper to demonstrate to employees that negotiations would begin with a blank contract.⁴⁴ 15 Cornejo, Jara, and Mitchell had been brought to Newport Meat in the guise of educating employees on unionization. Instead, under these circumstances, they did not simply state what would happen during negotiations but rather threatened employees that they would lose their benefits if they selected the Union and the Union would need to induce Newport Meat to reinstate their benefits. Thus, each of the statements by Cornejo, Jara, and Mitchell violate the 20 Section 8(a)(1) of the Act as alleged in complaint paragraphs 6(e), 11, 12(b), 12(e), and 12(g). *Consolidated Biscuit Co.*, 346 NLRB 1175, 1175 fn. 5 and at 36 (2006) (statement that bargaining starting “from zero” and “with a clean slate,” accompanied by a further statement that employees would “probably lose” certain benefits, constituted unlawful threat of loss of benefits); *Federated Logistics*, supra at 255–256 (employer comments that “we would start from 25 scratch and would negotiate from that,” the union would strike, and if a strike occurred the operation would be shut down and moved to another of the employer’s facilities in 3 days violated the Act).

⁴² Unlike in *La-Z-Boy*, 281 NLRB 338, 340 (1986), and *Clark Equipment Co.*, 278 NLRB 498, 499–500 (1986), cited in Newport Meat’s brief, the credited evidence does not show that Cornejo provided the complete picture of negotiations but instead repeatedly emphasized that negotiations would take away existing benefits from employees for selecting the Union.

⁴³ Here again, Newport Meat argues that employers may state that bargaining will begin from scratch or from zero but may not be stated coercively (R. Br. at 46, citing *Somerset Welding & Steel, Inc.*, 314 NLRB 829, 832 (1994)). While this tenet is true, the determination on lawfulness of conduct depends on the totality of the circumstances. Here, I find that in the totality of the circumstances Jara’s statement coupled with Cornejo’s comments leave employees with the impression that they only get what the Union may restore for them. *Plastronics, Inc.*, 233 NLRB 155, 156 (1977).

⁴⁴ About Mitchell’s testimony, I disagree with Newport Meat’s arguments that he was simply conveying the truths about bargaining (R. Br. at 47–48, citing *Wild Oats Markets, Inc.*, 344 NLRB 717 (2005), and *Taylor-Dunn Mfg. Co.*, 252 NLRB 799 (1980)). Rather his speech focused on what other Sysco employees have “lost” in negotiations after selecting a union as their collective-bargaining representative. Mitchell also told employees he could lower their salaries to match the employees at Palisades Ranch. Mitchell, who identified himself as the negotiator for Newport Meat, consistently repeated this theme throughout his speech. Considering the entirety of his speech, Mitchell’s remarks reasonably inferred coercive threats.

D. Threats Concerning Plant Closure and Job Loss

The General Counsel alleges at complaint paragraphs 12(c), 12(d), 12(f), and 14 that Mitchell unlawfully threatened employees with plant closure and job loss if they selected the Union as their collective-bargaining representative. Newport Meat argues that Mitchell's comments do not violate the Act as alleged as he conveyed lawful information regarding strikes within Section 8(c) (R. Br. at 48–49).

An employer's prediction of plant closure or job loss must be based on objective facts or refer to demonstrably probable consequence beyond the employer's control. *NLRB v. Gissel Packing Co.*, supra at 618–619 (1969). Conveyance of an employer's sincere belief that unionization will or may result in the closing of a plant is not a statement of fact, unless the eventuality of closing is capable of proof. Furthermore, any threat of plant closure is "among the most flagrant forms of interference" with employee rights and likely to have long-term coercive effects that are difficult to extinguish. *Garney Morris, Inc.*, 313 NLRB 101, 103 (1993), enfd. 47 F.3d 1161 (3d Cir. 1995). The impact of threats of closure are even more pronounced when they are delivered by high-ranking speakers who have relative power in the workplace. *America's Best Quality Coatings Corp.*, 313 NLRB 470, 472 (1993), enfd. 44 F.3d 516 (7th Cir. 1995), cert. denied 515 U.S. 1158 (1995).

Mitchell, during his presentation to the employees about unionization at other Sysco locations, discussed strikes at Newport Meat. Mitchell discussed strikes after relaying numerous examples of Sysco locations not reaching collective bargaining agreements with unions. Mitchell made clear to the employees that Newport Meat had options in the event of a strike unlike the employees. They could hire temporary or permanent replacement employees to cover the work or they could move the work to Palisades Ranch temporarily or permanently. Where statements made about striker replacement are linked to retaliation for selecting the union as the employees' representative, any ambiguities should be resolved against the employer. *L.S.F. Transportation, Inc.*, 330 NLRB 1054, 1066 (2000) (unlawful threat of job loss when employer commented that it would bring in replacement workers during a strike because it could be interpreted to mean that the employer encouraged a strike to hire replacement workers).

Mitchell also told the employees he could move the work to Palisades Ranch that day and slowly move all the work until no work existed at Newport Meat. Mitchell conveyed his power to do so as he explained to the employees that he would be the chief negotiator for Newport Meat, and would do only what was in the best interest of Respondent. Employees testified that Mitchell told them that if there was a strike, he would move the work from Newport Meat and would close Newport Meat. Far from basing his statements on objective fact, Mitchell made these statements after explaining to employees that they would be losers and a strike would be a forgone conclusion with employees replaced and Newport Meat closed. Even aside from a strike, Mitchell made statements that conveyed to employees that he could close Newport Meat if he chose during a time period he chose. Mitchell's comments exceed the permissible bounds of free speech permitted under Section 8(c) as the entire presentation by Mitchell was intended to coerce employees to vote against unionization by informing them that negotiations would take a long time with a strike being an inevitable outcome and employees being the "losers." Thus, I find that Newport Meat violated Section 8(a)(1) of the Act as alleged in complaint paragraphs 12(c), 12(d), 12(f), and 14.

E. Threats Concerning Employee Performance Reviews and Raises

The General Counsel alleges at complaint paragraphs 6(c), 8(d), 8(e), 10(b), 12(a), and 12(i) that Cornejo, Van Voorhis, Drury, and Mitchell violated Section 8(a)(1) of the Act when threatening to freeze employees' performance reviews and raises during the critical period and during negotiations if employees selected the Union as their representative.

It is undisputed that Newport Meat conducts a performance review on or about an employee's anniversary date of hire. As a result of the performance review along with tenure, Newport Meat's supervisors determine the amount of an employee's raise if warranted by the supervisor. During the critical period, Van Voorhis informed employees that their performance reviews and corresponding raises, if any, would be cancelled or frozen due to the representation election. Cornejo also told the employees that their wages and benefits would be frozen and the status quo in effect during negotiations, which could last years as he told them. Valdivia testified that Drury told the employees they could lose their retirement 401Ks and it could be frozen. Mitchell told employees that if they selected the Union as their representative, all benefits such as wages and 401Ks would be frozen during negotiations which could last a long time.

In *The Gates Rubber Co.*, 182 NLRB 95, 95 (1970), the Board states, "Neutrality is not maintained by an announced withholding of a wage increase because of a pending Board-conducted election. It is well settled that the employer's legal duty is to proceed as he would have done had the union not been on the scene." For example, an employer, during a union organizing campaign, informed employees that "Companies are not free to give wage increases or other benefits as long as Unions are on the scene" and that "a Company is not free to give wage increases or other benefits as long as Union organizational drives is going on." The company violated Section 8(a)(1) of the Act as those statements in an effort to influence votes in the upcoming representation clearly told employees that wages and benefits would have been granted "but for the presence of the Union and pendency of the election." *Travis Meat & Seafood Co.*, 237 NLRB 213, 217 (1978). Furthermore, a threat that performance reviews and raises would be frozen during negotiations if the employees voted for union representation also violates Section 8(a)(1) of the Act. See *Gould, Inc.*, 260 NLRB 54, 58 (1982).

Similarly, Newport Meat violated Section 8(a)(1) of the Act by threatening to freeze performance reviews and raises if warranted prior to the representation election and during negotiations to influence employees' vote in the upcoming election. Newport Meat certainly did not proceed as they would have done if there was no upcoming representation election. Instead, the action of freezing all performance reviews and raises punishes employees for choosing to engage in protected concerted activity. Newport Meat also violated Section 8(a)(1) by telling employees that their performance reviews, any raises and 401K plans would be frozen during negotiations, which could take years as described by Mitchell and Cornejo. Contrary to Respondent's argument, Van Voorhis never clarified with employees that they should be receiving their performance reviews (which they did not), but that their raises, if any, would be processed after the election (R. Br. at 39–40). Rather, Van Voorhis left out critical information in her discussion with employees which amounted to a threat to freeze their pay. Such a threat became reality when the employees did not receive their performance reviews and raises until

February or March 2018. Thus, Newport Meat violated the Act as alleged at complaint paragraphs 6(c), 8(d), 8(e), 12(a), and 12(i).

5 However, I dismiss complaint paragraph 10(b) as I did not find any credible evidence that Drury during a meeting on about October 23 threatened to freeze everything including raises and 401K's if they selected the Union.

F. Distribution of Flyer Regarding Health Insurance Subsidy

10 The General Counsel alleges at complaint paragraph 10(d) that Drury violated Section 8(a)(1) of the Act when he distributed a flyer, signed by Van Voorhis, to all employees informing employees in the petitioned-for-unit that they would not receive the same health insurance subsidy as other employees.

15 The record makes clear that Drury and Van Voorhis announced to employees on or about November 1, only 8 days before the representation election, that Newport Meat decided to pay a much larger portion of the HMO plan costs for the 2018 calendar year. Van Voorhis read this notice aloud in the meetings, and this notice was distributed to all employees in English and Spanish. The notice makes clear that this increase in subsidy would be “good news” for
20 employees and would be a substantial increase from the prior year. Drury and Van Voorhis testified that they would have received the HMO plan rates in September or October, and then they would have determined the amount of the subsidy which was solely their discretion. During their announcement, Van Voorhis and Drury made clear to the employees that those in the petitioned-for-unit would not be eligible for the larger subsidy due to the pending
25 representation election. These notices did not inform the employees what subsidy they would be eligible for after the election. Drury also told the employees that the reduction in healthcare costs was only for office employees, and if there was no Union involvement, it would have been for the petitioned-for-unit employees as well.

30 “It is well established that an employer is required to proceed with an expected wage or benefit adjustment as if the union were not on the scene. E.g., *Stumpf Motor Co.*, 208 NLRB 431, 433 (1975); *Dan Howard Mfg. Co.*, 158 NLRB 805, 813 (1966), *enfd.* in pertinent part 390 F.2d 304 (7th Cir. 1968); cf. *Dynatronics*, 186 NLRB 978, 979 (1970). An exception to this rule, however, is that an
35 employer may postpone such a wage or benefit adjustment so long as it “[makes] clear” to employees that the adjustment would occur whether or not they select a union, and that the “sole purpose” of the adjustment’s postponement is to avoid the appearance of influencing the election’s outcome.”

40 *Atlantic Forest Products*, 282 NLRB 855, 858 (1987) (citing *Uarco, Inc.*, 169 NLRB 1153, 1154 (1968)). In so doing, an employer must avoid placing the blame on the postponement of adjustments in wages and benefits on the union. *Uarco*, *supra*.

45 Applying these principles to this case, Newport Meat notified employees in the petitioned-for-unit that there would be a significant increase in the amount of subsidy they would offer to employees for 2018 but that due to a concern of “vote-buying” they would not be offering the subsidy to those in the petitioned-for-unit. Rather than making it clear to the

employees in the petitioned-for-unit that the subsidy would be offered to them whether or not they selected the Union as their representative, Newport Meat failed to clarify with those employees what would happen after the election.⁴⁵ Drury did mention to one employee that if there was no Union, the subsidy would be for the petitioned-for-unit employees as well.

Moreover, Newport Meat indirectly blamed the Union for the petitioned-for-unit employees not receiving this substantial subsidy. Thus, Newport Meat violated Section 8(a)(1) of the Act as described in complaint paragraph 10(d).

G. Distribution and Circulation of Anti-union Petitions

The General Counsel alleges that Van Voorhis and Drury violated Section 8(a)(1) of the Act, as described in complaint paragraphs 8(f), 8(g), 10(g), and 10(h), when they solicited employees to revoke their Union authorization cards by circulating anti-union petitions. The General Counsel also alleges at complaint paragraphs 15(b) through 15(f) that Newport Meat violated Section 8(a)(1) when authorizing Martinez, on duty time, to solicit employees to revoke their Union authorization cards by circulating an anti-union petition. As discussed above, I find that Martinez was an agent as defined by Section 2(13) of the Act.

After the representation election had been cancelled, Van Voorhis and Drury met with the employees to announce the cancellation. Van Voorhis and Drury also informed employees that they could ask for their authorization cards back from the Board, but the Board will need the Union to ask for the authorization cards back. In lieu of that method, Van Voorhis and Drury offered that employees could write a letter to the Union “demand[ing]” that the Union leave them alone since the Union “disrespect[ed]” the employees’ right to vote. Van Voorhis and Drury also provided letters addressed to the Union’s secretary-treasurer Kelly for the employees to sign and return to the Union; these letters asked the Union to reschedule the election immediately or withdraw the election petition. Several employees testified to receiving these letters during this meeting. Moreover, one employee testified that Van Voorhis distributed the letters and asked employees to sign them. During the meeting, Drury told the employees they had been tricked by the Union, and he had letters for them to sign to have their authorization cards returned; the return of the authorization cards was in essence a demand that the Union withdraw the election petition.

An employer may lawfully provide neutral information to employees regarding their right to withdraw their union support, provided that the employer offers no assistance, makes no attempt to monitor whether employees do so, and does not create an atmosphere “wherein employees would tend to feel peril in refraining from [withdrawing].” *Mohawk Industries*, 334 NLRB 1170, 1170–1171 (2001) (quoting *Vestal Nursing Center*, 328 NLRB 87, 101 (1999) (employer “provided envelopes, postage, and on several occasions, actually mailed letters for the employees,” rendering assistance “neither passive nor ministerial”). In *Escada (USA), Inc.*,

⁴⁵ Newport Meat argues that its notice to employees regarding the HMO plan did not differ from the employer in *Uarco*, supra, where the Board did not find objectionable conduct (R. Br. at 44–45). However, unlike in *Uarco* where the employer committed to pay the rate as promised with or without the union albeit postponed until after the election, Newport Meat informed the employees they would not receive the HMO plan subsidy as the office employees would receive, and never committed to offering this subsidy to the employees in the petitioned-for-unit after the representation election. Without these assurances that Newport Meat that would continue its established practice for offering an HMO subsidy, they violated the Act as alleged.

304 NLRB 845, 849 (1991), enfd. mem. 970 F.2d 989 (3d Cir. 1992), the Board affirmed the judge’s decision that the employer unlawfully explained the authorization card revocation process by distributing a sample revocation letter to employees in a context of contemporaneous unfair labor practices as well as informing employees it was in their “best interest” to revoke their authorization cards.

Here, Newport Meat violated the Act as alleged. First, I have found that Newport Meat committed numerous violations of the Act during the critical period which was only 1 month. Furthermore, I find that Van Voorhis and Drury provided more than ministerial or passive aid to employees to encourage them to have the Union withdraw the representation petition. Although not admitted, circumstantial evidence provides that Newport Meat drafted these letters with the specific information required to send to the Union demanding that they reschedule the election so the employees can “vote overwhelmingly” against the Union or withdraw the election petition (GC Exh. 2, pp. 2 and 4). Regardless of who drafted the letters, Van Voorhis and Drury provided the letters to the employees during the meetings and suggested that they sign these letters at the meetings. During their meetings, Van Voorhis and Drury coercively suggested to employees that because the Union knew that the employees would vote against unionization, the Union stopped the employees from making their free choice. Again, Van Voorhis stated at the meetings, “Here again, we cannot tell you what to do or not to do, and we are not telling or asking you to do anything, but if we were you, we would send a letter, similar to the one attached.” She further stated she would sign the letter on her own or with fellow employees. Van Voorhis and Drury’s actions of providing these letters to the employees, along with coercive statements made during the meetings, is far from providing neutral information on how employees could withdraw their support for the Union.⁴⁶ Furthermore, as will be discussed, Van Voorhis and Drury permitted Martinez to act on their behalf to encourage employees to sign these letters. Respondent clearly violated Section 8(a)(1) of the Act as alleged in complaint paragraphs 8(f) and 10(g).

As for Martinez’ role, I find that Newport Meat violated Section 8(a)(1) of the Act when Drury permitted Martinez to ask employees to sign the anti-union letters. The credited evidence shows that after Van Voorhis and Drury distributed the anti-union letter to the employees, Martinez took these letters and asked several employees to sign them on duty time. Martinez asked employees to sign these letters while they were working in the departments. Martinez also provided additional letters to the employees who no longer had copies. Martinez told the employees that they should not let the Union stop them and should find another way. Martinez testified that he informed Drury that he planned to ask employees to sign the letters, and Drury told Martinez to pass out letters on his own time. However, Martinez decided to speak to employees to sign these letters while he was on duty time. Despite not following Drury’s instructions not to ask employees to sign the anti-union letter while he was on duty time,

⁴⁶ In *Mid-Mountain Foods, Inc.*, 332 NLRB 229 (2000), cited by Newport Meat (R. Br. at 41–42), the Board found that the employer did not violate the Act when placing revocation of authorization cards in the break room, without monitoring whether employees took or used the form. The Board reasoned that in the context of the credited facts the employer’s conduct was not unlawful as there were only “relatively isolated” violations found, and the employer did not assist employees beyond providing the forms and did not monitor who took or used the forms. In contrast to *Mid-Mountain*, Newport Meat committed numerous violations of the Act as described within this decision. Furthermore, Newport Meat permitted Martinez to ask employees individually if they would sign the letters. As described herein, Martinez is an agent of Newport Meat, and thus is akin to a supervisor asking individual employees to sign the letters.

Martinez acted with the full knowledge of Drury. Many of the employees testified that Martinez seemed to be working with Drury and Van Voorhis, in part, because he asked the employees to sign the same letters Drury and Van Voorhis distributed. See *Hausner Hard-Chrome of KY*, 326 NLRB 426, 428 (1998) (manifestation of apparent authority strengthened when coercive statements of alleged apparent agents echoed statements of admitted agents); *Haynes Industries*, 232 NLRB 1092, 1099–1100 (1977) (employer knowledge of, and failure to disavow, the employee’s activities also raises the inference of apparent authority). Thus, I find that Newport Meat violated Section 8(a)(1) as alleged in complaint paragraphs 15(d), 15(e), and 15(f).

However, I dismiss complaint paragraphs 8(g) and 10(h) as I did not find any credible evidence that Van Voorhis and Drury on or about November 13 and 14 solicited employees to revoke their Union authorization cards by circulating an anti-union petition. I also dismiss paragraph 15(c) as I did not find any credible evidence that Martinez on or about November 9 and 23 in the locker room, solicited employees to revoke their union authorization cards by circulating an anti-union petition.

8(a)(3) and (1) Allegations

A. Did Newport Meat, beginning in October, withhold benefits from employees in the petitioned-for-unit by freezing employees’ annual performance reviews and raises because the employees assisted the Union and engaged in concerted activities, and to discourage employees from engaging in such activities?

The General Counsel alleges, in complaint paragraphs 17(a) through (b), that Newport Meat violated Section 8(a)(3) and (1) of the Act as described above. Respondent argues that Newport Meat only postponed the granting of wage increases until after the representation election (R. Br. at 50–51).

Newport Meat conducts performance reviews and corresponding raises on or within a 2-week period of an employee’s anniversary date. Although pay raises are not automatic, they are dependent on a yearly performance review. However, due to the representation election, Drury and Van Voorhis admitted that employees whose anniversary dates fell in October and November would not receive any raises if recommended by their supervisors. Van Voorhis testified that she informed employees that during the critical period, Newport Meat would not be giving any wage increases due to a perception of buying votes. However, Van Voorhis and Drury never informed the employees that the wage increases would only be postponed until after the election, no matter what the election results were. As for the performance reviews, Drury and Van Voorhis testified that they did not know whether those performance appraisals occurred in October and November. The credited evidence shows that several employees did not receive their performance appraisals and recommended raises until February or March 2018, which was retroactive for some employees but not all. Thus, it is undisputed that Newport Meat withheld annual pay raises, if the employee was eligible based on the performance review, in October and November.

Prior to a representation election, the withholding of pay raises from employees violates Section 8(a)(3) and (1) of the Act of the employees otherwise would have been granted the pay raises in the normal course of business. *SNE Enterprises, Inc.*, 347 NLRB 472, 472 (2006). As

a corollary matter, the Board has found it unlawful for an employer to suspend annual performance reviews and raises during the pendency of a contested union election. *United Rentals, Inc.*, 350 NLRB 951, 951 (2007). Here, clearly Newport Meat told employees they would not be receiving any wage increases which directly come from employees' performance appraisals which also did not occur. Newport Meat did not, contrary to their argument in their brief, inform employees that the raises would only be postponed until after the election, regardless of the results. Newport Meat provided no justification for withholding annual performance reviews and raises from employees except for the concern of buying votes. Instead, Newport Meat's action lay the blame at the feet of the Union for any withholding of these benefits. Thus, Newport Meat violated Section 8(a)(3) and (1) of the Act by withholding annual performance reviews and raises due to employees' union activity.

B. Did Newport Meat, in October or November, improve the terms and conditions of employment for its employees by removing a supervisor from the Irvine facility because the employees assisted the Union and engaged in concerted activities, and to discourage employees from engaging in such activities?

The General Counsel alleges, in complaint paragraphs 18(a) through (b), that Newport Meat violated Section 8(a)(3) and (1) of the Act as described above. Newport Meat argues that it is lawful for an employer to transfer an employee for legitimate business justifications which was their reason for moving Sanchez (R. Br. at 51).

The conferral of benefits during the pendency of a representation election may also violate Section 8(a)(3) and (1) of Act if the General Counsel proves the granting of the benefit is discriminatory. "The conferral of employee benefits while a representation election is pending, for the purpose of inducing employees to vote against the union" interferes with the employees' right to organize." *NLRB v. Exchange Parts Co.*, supra at 409. The analysis for a claim of benefits that are promised, announced, or granted to influence employees in their choice of bargaining representative is motive based. *Network Dynamics Cabling, Inc.*, supra at 1424. However, such a promise, announcement or grant of benefits is not automatically unlawful if the employer can show any legitimate reason for the timing of the benefit. *Id.*

Here, Newport Meat unlawfully solicited grievances from employees during meetings in October to discuss issues in the workplace. Numerous employees complained about their wages, benefits, lack of respect and the poor treatment from their supervisor Sanchez. During one of these meetings, Drury told employees that Newport Meat had handled the situation poorly and would investigate. During another meeting, Diaz told the employees he would have an answer to their complaints about Sanchez that afternoon. Prior to the filing of the representation petition, employees' complaints about supervisor Sanchez fell on deaf ears. However, after the filing of the representation petition during these meetings, Newport Meat decided to act on these complaints. Soon thereafter, the employees learned from supervisor Takeyama as well as Van Voorhis that Sanchez had been moved to another facility.

Drury incredibly testified that Sanchez had been moved in October because Newport Meat had a need at Palisades Ranch for Sanchez's skillsets. However, Drury's explanation is not credible due to the timing of events. It is clear from the entire record that Newport Meat's decision to move Sanchez in October after the filing of the representation election and

solicitation of grievances in the workplace was unlawfully motivated to discourage employees from voting for the Union. There was no evidence presented that Newport Meat planned to move Sanchez prior to October but rather an inference may be made of anti-union animus that the move of Sanchez was motivated by the upcoming representation election. Thus, I find

Drury's claim that Newport Meat moved supervisor Sanchez for legitimate business reasons rather than to address the employee's complaints to be pretextual as to discourage them from Section 7 activity. For the above reasons, I find that Newport Meat violated Section 8(a)(3) and (1) of the Act by removing supervisor Sanchez.

C. Did Newport Meat, beginning on about January 1, 2018, withhold a reduction in healthcare costs from employees in the petitioned-for-unit that it granted to all other unrepresented employees because the employees in the petitioned-for-unit assisted the Union and engaged in concerted activities, and to discourage employees from engaging in such activities?

The General Counsel alleges, in complaint paragraphs 17(a) through (b), that Newport Meat violated Section 8(a)(3) and (1) of the Act as described above. Newport Meat argues that it lawfully withheld the reduced health care costs, or increased subsidy amount, to avoid the appearance of influencing the election outcome (R. Br. at 51–52).

As explained herein, an employer's legal duty when deciding whether to grant benefits while a representation election is pending is to decide that question as the union were not involved in the workplace. *Atlantic Forest Products*, supra at 858. An employer may not tell employees that it is withholding benefits due to the representation election, but it may inform employees that those benefits will be deferred regardless of the election outcome. *Noah's Area Bagels, LLC*, 331 NLRB 188, 189 (2000).

Applying the above principles, Newport Meat violated Section 8(a)(3) and (1) of the Act by withholding the reduction in healthcare costs, in other words the increased subsidy, to employees in the petitioned-for-unit. Drury and Van Voorhis learned of the increase in health care costs for those employees with the HMO plan in either September or October. Thereafter, they made the decision on the amount of subsidy to offer to those employees with the HMO plan. Drury and Van Voorhis decided to offer a substantial increase in the subsidy they paid and decided to announce during the critical period to all employees this increased amount they would be offering. Drury and Van Voorhis then told employees in the petitioned-for-unit that they would not receive the increased subsidy due to the representation election and concerns about vote buying. Contrary to Newport Meat's argument, they did not tell the petitioned-for-unit employees that the increase in subsidy would be deferred for them until after the election, no matter the election outcome. Instead, they decided not to offer the subsidy to those employees. They also made it clear that this withholding of the benefit was due to the Union. Drury and Van Voorhis testified that employees in the petitioned-for-unit never received the increased subsidy as Newport Meat's other employees even after the election was postponed (Tr. 1105, 1138). Drury claimed that the insurance subsidy could not be provided to these employees because Newport Meat does not make mid-year adjustments.⁴⁷

⁴⁷ In the fall of 2018, Newport Meat provided the petitioned-for-unit employees the same subsidy it provided to non-voting employees in the fall of 2017, and the nonvoting employees' subsidy remained the same. Thus, all employees received the same subsidy in calendar year 2019 (Tr. 1055, 1139).

Accordingly, Newport Meat violated the Act as alleged.

CONCLUSIONS OF LAW

1. Respondent, Newport Meat Southern California, Inc., has been an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.
2. The Union, the General Truck Drivers, Office, Food & Warehouse Union, Teamsters Local 952, International Brotherhood of Teamsters, has been a labor organization within the meaning of Section 2(5) of the Act.
3. Respondent committed unfair labor practices in violation of Section 8(a)(1) of the Act by.
 - a. Soliciting employee complaints and grievances to discourage them from selecting the Union, or any other labor organization, as their representative.
 - b. Promising employees benefits from discouraging them from selecting the Union, or any other labor organization, as their representative.
 - c. Threatening employees that negotiations will start from zero if they select the Union, or any other labor organization, as their representative.
 - d. Threatening employees with closure of the Irvine facility and job loss if they choose to be represented by the Union, or any other labor organization.
 - e. Threatening to freeze employees' performance reviews and raises before the representation election and during negotiations if the employees select the Union, or any other labor organization, as their representative.
 - f. Distributing a flyer to employees which stated that employees in the petitioned-for-unit would not receive the same health insurance subsidy as all other unrepresented employees would receive starting January 1, 2018.
 - g. Distributing and circulating an anti-union petition.
4. Respondent committed unfair labor practices in violation of Section 8(a)(3) and (1) of the Act by.
 - a. Withholding annual performance reviews and raises for employees.
 - b. Improving the terms and conditions of employment for employees by removing a supervisor.
 - c. Withholding a reduction in healthcare costs for employees.

5. The unfair labor practices found affect commerce within the meaning of Section 2(6) and (7) of the Act.

5 6. All other allegations of the complaint are dismissed.

REMEDY

10 Having found that Respondent has engaged in certain unfair labor practices, I shall order it to cease and desist therefrom and to take certain affirmative action designed to effectuate the policies of the Act. Respondent having discriminatorily withheld performance appraisals and wage raises, if any, and reductions in healthcare costs for the calendar year 2018 for employees who were eligible to vote in the November 9, 2017 representation election, I shall order Respondent, to the extent not already done so, to retroactively issue the performance appraisals and wage raises, if any, and grant the benefit improvements and reduction in healthcare contribution rates to the employees in the petitioned-for-unit. I shall order Respondent to make current and former petitioned-for-unit employees whole for any losses suffered as a result of its unlawful conduct in the manner set forth in *Ogle Protection Service*, 183 NLRB 682 (1970),
 15 enfd. 444 F.2d 502 (6th Cir. 1971), with interest as prescribed in *New Horizons*, 283 NLRB 1173 (1987), compounded daily as prescribed in *Kentucky River Medical Center*, 356 NLRB 6 (2010). I shall further order Respondent to compensate affected current and former petitioned-for-unit employees for the adverse tax consequences, if any, of receiving lump-sum backpay awards, and file with the Regional Director a report allocating the backpay awards to the appropriate calendar years for each employee. *AdvoServ of New Jersey, Inc.*, 363 NLRB No.
 20 143 (2016).
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I will order that the employer post a notice at the Irvine facility in the usual manner, in both English and Spanish and any other languages deemed necessary by the Regional Director, including electronically to the extent mandated in *J. Picini Flooring*, 356 NLRB 11, 15–16
 30 (2010). In accordance with *J. Picini Flooring*, the question as to whether an electronic notice is appropriate should be resolved at the compliance phase. *Id. supra* at 13.

The General Counsel requests that I order that the notice be read aloud to employees, in English and Spanish, by a responsible management official of Newport Meat in the presence of
 35 a Board agent, or in the alternative, be read aloud, in English and Spanish, by a Board agent, in the presence of management officials (GC Br. at 114–115). The Board has recognized that notice reading is an extraordinary remedy but, in this instance, I believe the facts present themselves to support such a request as Newport Meat, including by its president, area president-western region, and Sysco’s Director of Labor Relations, committed during the one-month period before the representation election dozens of 8(a)(1) violations of the Act, most of which were verbal violations. *Sysco Grand Rapids, LLC*, 367 NLRB No. 111 (2019); see *Stern Produce Co., Inc.*, 368 NLRB No. 31, slip op. at 5 (2019) (citing *North Memorial Health Care*, 364 NLRB No. 61, slip op. at 1 (2016) (notice reading appropriate in part due to high-ranking responsible management officials in unfair labor practices), enfd. in relevant part 860 F.3d 639
 40 (8th Cir. 2017). Such pervasive unlawful conduct, as described and found herein, warrants a notice reading. Such a public reading of the notice will serve to reassure employees that that
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their employer and its super are bound by the Act's requirements. *Homer D. Bronson Co.*, 349 NLRB 512, 515 (2007) (and cited cases), enfd. mem. 273 Fed.Appx. 32 (2d Cir. 2008).

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended⁴⁸

ORDER

Respondent, Newport Meat Southern California, Inc., Irvine, California, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Soliciting employee complaints and grievances to discourage them from selecting the General Truck Drivers, Office, Food & Warehouse Union, Teamsters Local 952, International Brotherhood of Teamsters (the Union), or any other labor organization, as their representative.

(b) Promising employees benefits to discourage them from supporting the Union, or any other labor organization, as their representative.

(c) Threatening employees that negotiations will start from zero if they select the Union, or any other labor organization, as their representative.

(d) Threatening employees with closure of the Irvine facility and job loss if they choose to be represented by the Union, or any other labor organization.

(e) Threatening employees that their performance reviews and wage raises will be frozen before the representation election and during negotiations if the employees select the Union, or any other labor organization, as their representative.

(f) Distributing a flyer to employees which stated that employees in the petitioned-for-unit would not receive the same health insurance subsidy as all other unrepresented employees would receive starting January 1, 2018.

(g) Distributing and circulating an anti-union petition.

(h) Withholding benefits from employees in the petitioned-for-unit by freezing performance reviews and wage raises to discourage employees from assisting the Union, or any other labor organization, and engaging in concerted activities.

⁴⁸ If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

(i) Removing a supervisor from the Irvine facility to improve employees' terms and conditions of employment to discourage employees from assisting the Union, or any other labor organization, and engaging in concerted activities.

5 (j) Withholding from employees in the petitioned-for-unit a reduction in healthcare costs that was granted to all other unrepresented employees, starting on January 1, 2018.

(k) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

10 2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Make employees whole for any loss of earnings and other benefits suffered as a result of the discrimination against them in the manner set forth in the remedy section of this
15 decision.

(b) Compensate employees for the adverse tax consequences, if any, of receiving lump-sum backpay awards, and file with the Regional Director for Region 21, within 21 days of the date the amount of the backpay is fixed, either by agreement or Board order, a report
20 allocating the backpay award to the appropriate calendar years.

(c) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel
25 records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of the backpay due under the terms of this Order.

(d) Within 14 days after service by the Region, post, in both English and Spanish, at
30 its Irvine facility copies of the attached notice marked "Appendix."⁴⁹ Copies of the notice, on forms provided by the Regional Director for Region 21, after being signed by Respondent's authorized representative, shall be posted by Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, notices shall be distributed
35 electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if Respondent customarily communicates with its employees by such means. Reasonable steps shall be taken by Respondent to ensure that the notices are not altered, defaced, or covered by any other material. If, during the pendency of these proceedings, Respondent has gone out of business or closed the facility involved in these proceedings, Respondent shall duplicate and
40 mail, at its own expense, a copy of the notice to all current employees and former employees employed by Respondent at any time since October 9, 2017.


⁴⁹ If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

(e) Within 14 days after service by the Region, hold a meeting or meetings, at the Irvine facility, scheduled to ensure the widest possible attendance, at which the “Notice to Employees” is to be read to the employees, in English and Spanish, by Respondent’s responsible management official or at Respondent’s option, by a Board agent in the presence of management officials

(f) Within 21 days after service by the Region, file with the Regional Director for Region 21 a sworn certification of a responsible official on a form provided by the Region attesting to the steps that Respondent has taken to comply.

IT IS FURTHER ORDERED that the complaint allegations are dismissed insofar as they allege violations of the Act not specifically found.

Dated, Washington, D.C. February 25, 2020


Amita Baman Tracy
Administrative Law Judge

APPENDIX

NOTICE TO EMPLOYEES

POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD

An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union
Choose representatives to bargain with us on your behalf
Act together with other employees for your benefit and protection
Choose not to engage in any of these protected activities.

WE WILL NOT solicit your complaints and grievances to discourage you from supporting the General Truck Drivers, Office, Food & Warehouse Union, Teamsters Local 952, International Brotherhood of Teamsters (the Union), or any other labor organization, as your representative.

WE WILL NOT promise you benefits to discourage you from supporting the Union, or any other labor organization, as your representative.

WE WILL NOT threaten you that negotiations will start from zero if you select the Union, or any labor organization, as your representative.

WE WILL NOT threaten you with closure of the Irvine facility and job loss if you choose to be represented by the Union, or any other labor organization.

WE WILL NOT distribute a flyer to you which stated that you would not receive the same health insurance subsidy as all other unrepresented employees would receive starting on January 1, 2018.

WE WILL NOT threaten you that your performance reviews and wage raises will be frozen before any representation election and during any negotiations if you select the Union, or any other labor organization, as your representative.

WE WILL NOT distribute and circulate an anti-union petition.

WE WILL NOT withhold benefits from you by freezing performance reviews and wage raises to discourage you from assisting the Union, or any other labor organization, and engaging in concerted activities.

WE WILL NOT remove a supervisor from the Irvine facility to improve your terms and conditions of employment to discourage you from assisting the Union, or any other labor organization, and engaging in concerted activities.

WE WILL NOT withhold from you a reduction in healthcare costs that was granted to all other unrepresented employees, starting on January 1, 2018.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights listed above.

WE WILL make you whole for any loss of earnings and other benefits you suffered as a result of our unlawful withholding of your wage raises and healthcare subsidy, plus interest.

WE WILL compensate you for the adverse tax consequences, if any, of receiving lump-sum backpay awards, and we will file with the Regional Director for Region 21, within 21 days of the date the amount of backpay is fixed, either by agreement or Board order, a report allocating the backpay award to the appropriate calendar years for each employee.

NEWPORT MEAT SOUTHERN CALIFORNIA,
INC.

(Employer)

Dated _____ By _____
(Representative) (Title)

The National Labor Relations Board is an independent Federal agency created in 1935 to enforce the National Labor Relations Act. It conducts secret-ballot elections to determine whether employees want union representation and it investigates and remedies unfair labor practices by employers and unions. To find out more about your rights under the Act and how to file a charge or election petition, you may speak confidentially to any agent with the Board's Regional Office set forth below. You may also obtain information from the Board's website: www.nlr.gov.

U.S. Courthouse-Spring Street, 312 N. Spring Street, Suite 10150,
Los Angeles, CA 90012
(213) 894-5200, Hours: 8:30 a.m. to 5 p.m.

The Administrative Law Judge's decision can be found at www.nlr.gov/case/21-CA-209861 or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1015 Half Street, S.E., Washington, D.C. 20570, or by calling (202) 273-1940.



THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE

THIS NOTICE MUST REMAIN POSTED FOR 60 CONSECUTIVE DAYS FROM THE DATE OF POSTING AND MUST NOT BE ALTERED, DEFACED, OR COVERED BY ANY OTHER MATERIAL. ANY QUESTIONS CONCERNING THIS NOTICE OR COMPLIANCE WITH ITS PROVISIONS MAY BE DIRECTED TO THE ABOVE REGIONAL OFFICE'S COMPLIANCE OFFICER (213) 634-6502.